S. HRG. 99-873

THE FERES DOCTRINE AND MILITARY MEDICAL MALPRACTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 489 and H.R. 3174

BILLS TO AMEND CHAPTER 171 OF TITLE 28, UNITED STATES CODE, TO ALLOW MEMBERS OF THE ARMED FORCES TO SUE THE UNITED STATES FOR DAMAGES FOR CERTAIN INJURIES CAUSED BY IMPROPER MEDICAL CARE PROVIDED DURING PEACETIME

JUNE 24, 1986

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THE FERES DOCTRINE AND MILITARY MEDICAL MALPRACTICE

TUESDAY, JUNE 24, 1986

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:12 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee), presiding.

Present: Senators Specter, Kennedy, and Heflin.

Also present: Samuel Gerdano, counsel.

Senator GRASSLEY [presiding]. The committee will come to order.

At this point I am not going to give my opening statement but I am going to immediately defer to my colleagues who probably have obligations like I am going to have, voting at 10:20, and get those out of the way.

[The prepared statement of Senator Grassley follows:]

Opening Statement of Senator Charles E. Grassley

Our hearing this morning will consider the Feres Doctrine and its relationship to instances of military medical malpractice.

At the outset, I must say that I find this to be an extremely difficult and troubling issue. Difficult, because any easy legislative response raises thorny legal questions and potentially unlimited governmental liability. Troubling, because we're faced with instances of great personal tragedy, caused by government neglect.

First, I'd like to provide some background, to explain how it is we've reached this point.

In 1946, Congress enacted the Federal Tort Claims Act. The Tort Claims Act waives the government's sovereign immunity in broad language. It makes the Government liable for the negligent or wrongful acts of any Government employee acting within the scope of employment. This liability is determined "in the same manner and to the same extent as a private individual under like circumstances." There are some specific exceptions to jurisdiction, such as for discretionary governmental functions, intentional torts, and claims arising in foreign countries.

Shortly after passage of the Act, courts faced the issue of the servicemember's right to sue. In 1949, the Supreme Court held in the case of United States v. Brooks, that the plain language of the Act did not exclude claims by servicemembers. In Brooks, two brothers, both active-duty servicemen, suffered injuries in an automobile accident. They were on military leave and off base on a public highway when they were struck by a Government vehicle. The Supreme Court allowed suit under the Federal Tort Claims Act, but limited its holding to claims not incident to the service of a military member. The Supreme Court reserved decision on the "wholly different case" of injuries incident to service.

One year later, in Feres v. United States the Supreme Court faced that "wholly different case." The Feres case involved a widow suing under the Tort Claims Act for the wrongful death of her active-duty husband, who died in a fire while he slept in his barracks. The Court unanimously held that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries are in the course of activity incident to service.

In two companion cases, the Court extended Feres to cover medical malpractice cases brought by active-duty servicemen. Thus, the suits were barred.

The bills that are before us, though differing in certain respects, would amend the Tort Claims Act. They would allow active-duty members of the Armed Forces to sue the U.S. for money damages for injuries caused by improper medical care.

There is an understandable concern over the bigger issue of quality of military medical care. In large measure, it's traceable to several distressing and well-publicized cases of medical malpractice -- each with disasterous consequences for the victims and their families.

A number of these cases were fully aired at hearings before the House Judiciary Committee and the Senate Armed Services Committee.

All of us who have read the record of those hearings have been moved to ask what can be done to improve the quality of medical care within the Defense Department. At the highest levels of the chain of command, we must have a commitment that everything possible is being done to ensure that these incidents don't continue.

We need not repeat the record of past hearings. Instead, our jurisdiction covers the Federal Tort Claims Act, and amendments to it. Accordingly, we will ask whether a tort remedy against the government is the one that best ensures accountability and adequate compensation.

We will explore whether the legal rationale provided by the Supreme Court 36 years ago still makes sense today. We will challenge the opponents of this legislation to tell us what's wrong with giving our men and women in the service the same legal right under the F.T.C.A. that all others have. We will also challenge the proponents of a litigation remedy to convince us that creating more litigation against the government is the best solution.

Our witnesses today will appear in panels. I will ask each witness to sumarize his statement within 7 minutes. Your prepared statement will appear in the record in full.

In the days following the hearing, you may receive questions in writing from Subcommittee members. We will keep the record open to give you a chance to respond to these inquiries.

With that, I'd like to begin.

II

99TH CONGRESS
1ST SESSION

S. 489

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care provided during peacetime.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 21 (legislative day, FEBRUARY 18), 1985

Mr. SASSER (for himself, Mr. PELL, Mr. GORE, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care provided during peacetime.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 2681. Certain claims by members of the Armed Forces of the United States

"(a) Claims may be brought under this chapter for damages against the United States for the personal injury or death of a member of the Armed Forces of the United States arising out of the noncombatant activities of the Armed Forces while such member is serving on active duty if the claim arises out of the negligence of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Armed Forces acting within the scope of their office or employment in a hospital or other medical facility of the Armed Forces.

"(b) Actions brought pursuant to this section shall be brought in the appropriate court of the United States.

"(c) The remedy against the United States provided by this section shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim.".

(b) The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2681. Certain claims by members of the Armed Forces of the United States.".

SEC. 2. Section 2681 of title 28, United States Code, as added by the first section of this Act, shall apply only with respect to claims arising on or after the date of enactment of this Act.

○

II

99TH CONGRESS
1ST SESSION

H. R. 3174

IN THE SENATE OF THE UNITED STATES

OCTOBER 9 (legislative day, SEPTEMBER 30), 1985
Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CLAIMS FOR IMPROPER MEDICAL CARE.

(a) COGNIZABLE CLAIMS.—Chapter 171 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 2681. Certain claims by members of the Armed Forces

"(a) CLAIMS OF MEMBERS OF ARMED FORCES.—Subject to all the provisions of this chapter, claims may be

brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Forces serving on active duty or on full-time National Guard duty (as defined in section 101(42) of title 10), under the conditions prescribed in this section.

"(b) WHERE CARE PERFORMED.—The personal injury or death referred to in subsection (a) must have arisen out of medical or dental care furnished the member of the Armed Forces in a fixed medical facility operated by the Secretary of a military department or any other fixed medical facility operated by the United States.

"(c) DEFINITIONS.—For purposes of this section:

"(1) The term 'fixed medical facility' means a medical center, hospital, or clinic that is located in a building, structure, or other improvement to real property.

"(2) The term 'personal injury' does not include mental or emotional disability unless it is the direct result of a physical injury.

"(d) REDUCTION OF CLAIMS BY OTHER BENEFITS.—The payment of any claim for personal injury or death of a member of the Armed Forces under this section shall be reduced by the present value of other benefits received by the member and the member's estate, survivors, and benefici-

aries, under title 10, title 37, or title 38 that are attributable to the personal injury or death from which the claim arose.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end the following new item:

"2681. Certain claims by members of the Armed Forces.".

SEC. 2. EFFECTIVE DATE.

Section 2681 of title 28, United States Code, as added by section 1 of this Act, shall apply only with respect to personal injuries or deaths occurring on or after the date of the enactment of this Act.

Passed the House of Representatives October 7, 1985.

Attest: BENJAMIN J. GUTHRIE,

Clerk.

Senator GRASSLEY. I will call first of all on Senator Kennedy.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman.

I want to express my appreciation for your willingness to hold this hearing. This is not a new subject for the Senate. Over the period of the past years we have had seven hearings on the Feres doctrine, and in the most recent times we have had very extensive hearings in the Armed Services Committee that has a very prime interest in this and leading those hearings have been our good friend and colleague, the Senator from Tennessee, Senator Sasser, who I think has made an extremely effective and compelling and convincing case.

I want to say that, as one who sat through the hearings on the Armed Services Committee, I find a very, very strong case and support for the legislation. I am mindful that we have Congressman Glickman here who has worked on it in the House. This legislation has passed overwhelmingly in the House. We see broad support for it and I am very hopeful that we will be able to get some action on this legislation in this period of the Congress and I would like to ask that my full statement be submitted and I want to indicate my strong support for the Sasser legislation.

Senator GRASSLEY. Without objection, your statement will be printed as submitted.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

I WELCOME THIS HEARING ON THE IMPORTANT ISSUE OF THE REPEAL OF THE FERES DOCTRINE FOR MEDICAL MALPRACTICE CASES.

I AM A COSPONSOR OF SENATOR SASSER'S BILL TO ALLOW MEMBERS OF THE ACTIVE MILITARY SERVICE AND THEIR FAMILY TO RECOVER DAMAGES FROM THE GOVERNMENT FOR INJURIES OR DEATH ARISING FROM MEDICAL MALPRACTICE.

SOLDIER VICTIMS OF FAULTY MEDICAL TREATMENT IN THE MILITARY ARE PRESENTLY ALLOWED DISABILITY COMPENSATION -- OR STANDARD DEATH BENEFITS -- AND NOTHING MORE. THE RESULTS, INCLUDING CASES I PERSONALLY HAVE ENCOUNTERED IN MASSACHUSETTS, ARE DEVASTATING AND UNACCEPTABLE.

THE FERES DOCTRINE ORIGINATED OVER 35 YEARS AGO IN A SUPREME COURT DECISION BASED ON THE NEED TO INSURE MILITARY DISCIPLINE BY PROHIBITING LAW SUITS BY MEN AND WOMEN IN THE ARMED FORCES FOR INJURIES ARISING FROM THE HAZARDOUS DUTY OR COMBAT ACTION THAT IS INHERENT IN MILITARY SERVICE. BUT THIS PRINCIPLE IS EXPANDED TOO FAR WHEN APPLIED TO MEDICAL MALPRACTICE CASES INVOLVING PHYSICAL INJURIES OR EVEN DEATH SUFFERED DURING PEACETIME BECAUSE OF INADEQUATE MILITARY HEALTH CARE. TRADITIONAL MILITARY DISCIPLINE DOES NOT DEMAND THAT THE GOVERNMENT BE IMMUNIZED AGAINST THE HARMFUL CONSEQUENCES OF THE NEGLIGENCE OF ITS OWN MEDICAL STAFF.

I BELIEVE THAT IT IS TIME TO CREATE AN EXCEPTION TO THE FERES DOCTRINE BY EXEMPTING MEDICAL MALPRACTICE. I BELIEVE THAT THIS LEGISLATION IS SIMPLE AND EFFECTIVE. ALTHOUGH REFINEMENT OF THE BILL MAY BE NECESSARY IN LIGHT OF CONCERNS EXPRESSED IN THIS HEARING, I ENDORSE ITS BASIC APPROACH.

THE BILL WOULD ONLY ALLOW SUITS FOR MEDICAL MALPRACTICE IN PEACETIME, FOR NON-COMBAT RELATED MEDICAL DAMAGES, AND WOULD NOT HOLD MILITARY DOCTORS INDIVIDUALLY LIABLE, RATHER THE GOVERNMENT WOULD BE LIABLE. BESIDES CORRECTING THE INJUSTICE CAUSED BY THE FERES DOCTRINE, THIS LEGISLATION WILL ENHANCE THE ACCOUNTABILITY OF THE MILITARY HEALTH CARE SYSTEM. THIS IS AN IMPORTANT STEP IN THE RIGHT DIRECTION TOWARD THE GOAL OF IMPROVING THE QUALITY OF HEALTH CARE FOR THIS COUNTRY'S ARMED FORCES.

Senator GRASSLEY. I will now turn to Senator Sasser, from Tennessee and also Congressman Glickman, if we could have you at the table at the same time. I served in the House with Congressman Glickman, from Kansas, and know him not only as a colleague but as a friend and somebody who has worked very closely with me on agricultural legislation.

Senator Sasser, would you start, please?

STATEMENT OF HON. JIM SASSER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator SASSER. Thank you, Mr. Chairman.

Mr. Chairman, I want to begin by commending you for calling this hearing this morning on the application of the Feres doctrine to military malpractice cases, and I want to also commend the distinguished ranking member of this subcommittee, Senator Kennedy, for his ongoing interest in this very vital topic and for his support not only on this subcommittee but also on the Armed Services Committee where I had the honor to testify on this same subject.

Mr. Chairman, I have called for a number of years for modifying the Feres doctrine. My interest in this whole issue springs from cases that bubbled up through my constituent service program in the State of Tennessee.

We had a young man by the name of Doyle Stanley which became a very celebrated case, who came into our office in Nashville, TN—Mr. Stanley was a petty officer in the Navy—fearing really that he would be sent back to another naval hospital for treatment of his condition. Ultimately, Mr. Stanley's whole frontal skull bone was removed as a result of negligent treatment and today he is deformed and required to wear a helmet to protect the frontal lobe of his brain, since all of the bone tissue has of necessity had to be removed as a result of staph infections that were allowed to run through his sinus and deteriorate the bone and other problems.

We also were contacted by the family of Chief Petty Officer Rex Titus, who was deceased. Chief Petty Officer Titus had a heart condition that contraindicated administering certain drugs to this individual. These drugs were administered to him at Portsmouth Naval Hospital and as a result they killed him. We were contacted by his family in an effort to try to seek some sort of legal redress and some sort of compensation.

So for nearly 3 years I have been investigating cases involving active-duty military personnel who have been injured while being treated at military medical facilities. My investigation uncovered a virtual lack of all accountability for malpractice such as I have detailed with Petty Officer Stanley and Chief Petty Officer Titus.

In several cases, medical records appeared to have been tampered with. It was impossible to get a full disclosure of the medical records because some were missing regarding individuals.

Thorough investigations of cases of shortcomings in military medicine seemed to be pursued, frankly, only when outside pressure was placed on the military medical structure.

My investigation pointed out that the Feres doctrine was being used as a shield by some in military medicine. They were hiding

behind the Feres doctrine to prevent complete military medicine investigations. To address this problem, I introduced S. 489 in February 1985. The legislation would amend the Federal Tort Claims Act to allow active-duty members of the armed services to sue for medical malpractice.

My investigations into the quality of military medicine pointed out that such a reevaluation of the Feres doctrine was necessary. The cases I explored, Mr. Chairman, called out for a narrowing of the Feres doctrine.

Now, some of the witnesses that will appear before this subcommittee today will disagree with me on this point. They will contend that such action would undermine military discipline. I do not buy that argument, Mr. Chairman. And as Senator Glenn so perceptively pointed out in testimony before the Armed Services Committee, speaking I think both as a U.S. Senator and as a former career officer in the U.S. Marine Corps, knowing that they could sue for medical malpractice would not undermine military discipline, but it would affirmatively contribute very effectively to raising the morale of military personnel.

And I might add that currently 70 to 80 percent of the military's patient population can file suit. These principally are dependents and retirees. It does not seem fair that the wife of Petty Officer Doyle Stanley could have sued a military doctor for negligently treating her, but her husband could not sue the same military physician for malpractice.

They will raise other arguments against my legislation, but ultimately, considering the Feres doctrine, we must return to questions of what is fair and what is equitable.

The men and women who serve our country should not forfeit their right to their day in court simply because of their status on active military duty. Equity demands that the right to sue for medical malpractice in peacetime should not be denied to the small minority, some 20 or 30 percent who cannot presently bring such actions.

Fairness demands that the Feres doctrine never again be used as a shield behind which the military can hide inadequate care given to any soldier, sailor or airman in the Defense Department.

Mr. Chairman, my concern about the lack of quality care causes me to closely examine the Feres doctrine. It is my belief that we can actually improve the quality of care in military medical facilities by lifting the Feres doctrine prohibition in such cases.

The white light of the courtroom would expose for all to see any problems in our military medical system. It would let the sunshine in. It would also discover those physicians responsible for such problems.

I think the recent case involving Dr. Donald Billig underscores the impact that legal action can have on our military medical system. As a result of the scrutiny generated by this case, the Department of Defense Office of Health Affairs embarked on several steps to improve the quality of medical care.

I commend the Department for initiating a peer review program which, in addition to reviewing a substantial number of all cases, will examine all cases dealing with the deaths of military personnel.

The military has signed a directive that will require all physicians in the military medical system to have a State medical license within 3 years, something that is long overdue.

The Department has also strengthened its directives relating to quality assurance programs. These are important first steps and we must not waiver in our demand for high-quality medical care for military personnel. The responsibility for moving ahead on this important legislation rests squarely with the Senate.

Legislation similar to mine, H.R. 3174, was overwhelmingly passed by the House last October under the supervision and excellent performance and services of Representative Glickman and I want to commend him for that.

Our service men and women are watching the Senate to see if we will likewise move to protect their rights. In closing, Mr. Chairman, I want to thank you for your consideration of this legislation and reiterate my thanks to the ranking member for his support. I appreciate the opportunity to appear before you and I strongly urge the subcommittee to act expeditiously on this most important matter.

Thank you, Mr. Chairman.

Senator GRASSLEY. Congressman Glickman?

STATEMENT OF REPRESENTATIVE DAN GLICKMAN, A U.S. REPRESENTATIVE FROM THE STATE OF KANSAS

Mr. GLICKMAN. Thank you, Mr. Chairman and Senator Kennedy. I am delighted to be here.

Senator KENNEDY. May I ask just one question before——

Mr. GLICKMAN. Sure.

Senator KENNEDY. I believe the administration will say that the steps that they have taken that you have just mentioned here will really deal with the objectives that you want to achieve in your legislation. You refer to that. Could you just comment on that?

Senator SASSER. I did not catch the first part.

Senator KENNEDY. They will say that the steps that they have taken in recent times in terms of the licensing provisions and other steps that they have taken really respond to the kinds of problems that you have. Would you agree with me that those are useful steps but they are still wide of the mark in terms of what you are attempting to do? I think that is what the thrust of their argument is going to be.

Senator SASSER. Senator, as I said in my statement, I think those are useful steps, but they will not fulfill the purpose of repeal of the Feres doctrine. The Feres doctrine gives military personnel the right to go into a court of law and seek redress for negligence or medical malpractice. Now, that is an on-going right, and I think the ability to do that will act as a prod to military medicine to keep them moving in the direction of providing top-quality medical care to our military personnel.

It is not a question really of not having the proper rules and regulations, et cetera. They have got all sorts of rules and regulations in the military medical structure now. The problem is they simply do not enforce them, and one way to keep them on the proper

track of prompt enforcement in my judgment is to subject them to the jeopardy of the civil courts in this land.

Senator KENNEDY. Thank you very much. Thank you, Mr. Chairman.

Senator GRASSLEY. Congressman.

Mr. GLICKMAN. Thank you. Senators, I appreciate very much being here and I will not echo everything that Senator Sasser has so aptly stated, but I would ask unanimous consent that my entire statement appear in the record. I also submit for your committee records the report accompanying H.R. 3174 as well as the bill that passed the House, and I will make the following comments just to reemphasize one point.

Under current law, any person who is a victim of medical malpractice in a Government hospital can sue the Government in tort except active-duty military personnel. From my way of thinking, that exception, particularly as it relates to medical malpractice, has the effect of making our active-duty military personnel second-class citizens when it comes to their legal rights. They are treated in a discriminatory fashion. An example under current law is someone who goes into Bethesda Hospital to get their gallbladder removed and, instead, their kidney is removed. That person is entitled to sue the Government under the Federal Tort Claims Act, unless the person is on active-duty with the U.S. Armed Forces. The spouse or children of active duty service personnel can go in and have the exact same thing happen to them, and they can sue. That distinction is just unfair. It seems that in this day and age, when we have very, very strong and positive feelings about those soldiers and sailors who are serving in our Government that we should not treat them in a discriminatory fashion relative to the medical care they receive in Government or military hospitals.

I am not talking about combat situations. Our bill specificially excludes that situation. H.R. 3174 deals with noncombat situations in fixed military hospitals. In that kind of normal, routine care, I think our folks in the military ought to know that they are getting quality treatment and that they have the same status under the law as anybody else would have.

A year ago my subcommittee held hearings on this issue on a bill sponsored by Congressman Frank of Massachusetts—and, by the way, it is his bill that we approved. We heard horror story after horror story of medical malpractice in military hospitals. None of the individuals we heard from were able to sue the Government, although they did receive some compensation from the Government under existing laws. It was evident, however, that this compensation was far from adequate for the painful, often debilitating injuries they had suffered.

One example of just how bad some of these situations are is the case of Jerry Meagher. Jerry was 22 years old when he checked into Balboa Naval Hospital in 1974 to have a cyst removed from his left arm. Jerry is now severely brain-damaged and a quadraplegic. He requires 24-hours-a-day care. His mother testified before my subcommittee that it takes all of the VA compensation that Jerry receives, plus $600 to $800 a month to take care of Jerry.

With a situation like his in mind, it is easy to understand why people like Mrs. Meagher are outraged when they learn that Fed-

eral prisoners in Federal penitentiaries can sue the United States of America for medical malpractice, but our servicemen and servicewomen cannot. It is an inequity which Congress should remedy without delay.

H.R. 3174 has been carefully drafted and tailored to provide for suits under the Federal Tort Claims Act for medical or dental malpractice that occurs in Government hospitals under peacetime conditions. It does not, nor is it intended, to apply to field hospitals or during times of war. Times of war are unusual situations and that exclusion should not be tampered with.

I would further point out that the bill is drafted so that cases brought under it would be subject to the applicable State tort claims laws, hence it would not in any way be circumventing the numerous changes that are being made by State legislatures in the medical liability area.

All we are saying is that soldiers and sailors entering a military hospital for basically routine medical care ought to be given the same rights with respect to suing the Government for malpractice as any other American citizen is given.

It seems to me to be a matter of justice and equity, that in a peacetime situation, in a government hospital that is the equivalent of a civilian facility—that our military personnel should be allowed to sue the United States for malpractice as can other citizens. You go into Bethesda to have a gallbladder removed or to have a hernia operation, there is really no difference than going into the Washington Hospital Center. It is the same kind of medical treatment and relationship between the person needing the care and the physician in the hospital is the same.

In the interest of justice and equity, I urge your committee to move this bill to the floor. Thank you very much.

[The prepared statement of Representative Glickman follows:]

Prepared Statement of Dan Glickman, a U.S. Representative from the State of Kansas

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you this afternoon and to urge you to report H.R. 3174 so it can still be enacted into law this year. This bill passed the House last October.

H.R. 3174, an amendment to the Federal Tort Claims Act, adds a new section to the Act. The purpose of the bill is to provide jurisdiction under the Federal Tort Claims Act to allow active duty members of the Armed Forces to bring actions against the United States for medical and dental malpractice which occurs in a fixed medical facility which is operated by the United States or the Department of Defense.

Under the current law, any person who is a victim of medical malpractice in a Government hospital can sue the Government in tort, except active duty military personnel. From my way of thinking, that exception has the effect of making our active duty military personnel second class citizens when it comes to their legal rights.

By way of background, I might point out that the Federal Tort Claims Act was enacted in 1946. The Act is silent as to the rights of active duty military personnel who are tort victims by the Government. The only reference to the military is in section 2680, which excludes injuries arising out of combat activities from actions allowed under the Act.

In 1950, the Supreme Court accepted certiorari in three cases: Feres v. United States, Jefferson v. United States, and United States v. Griggs. All three of these cases were negligence cases in which military personnel were the victims. Jefferson and Griggs were both medical malpractice cases. The decision rendered by the Supreme Court, commonly known as the Feres Doctrine, held that active duty service personnel cannot sue the Government for negligence. The result of this decision has been to preclude suits against the Government for medical malpractice by active duty service personnel, although I might point out that dependents of military personnel, retirees, and even federal prisoners can sue for such injuries.

A year ago next month, my subcommittee held hearings on this issue. We heard horror story after horror story of medical malpractice in military hospitals. None of the individuals we heard from were able to sue the Government. Although they did receive some compensation from the Government under existing laws, it was evident that this compensation was far from adequate for the painful, often debilitating injuries they had suffered.

One example of just how bad some of these situations are is the case of Jerry Meagher. Jerry was 22 years old when he checked into Balboa Naval Hospital in 1974 to have a cyst removed from his left arm. Jerry is now a severely brain damaged quadraplegic. He requires 24-hour a day care. His mother testified before my subcommittee that it takes all of the VA compensation that Jerry receives, plus $600 to $800 a month to take care of Jerry.

With a situation like Jerry Meagher's in mind, it is easy to understand why people like Mrs. Meagher are outraged when they learn that federal prisoners can sue the Government for medical malpractice, but our servicemen and women cannot. It is an inequity which the Congress should remedy without delay.

The bill, H.R. 3174, has been carefully drafted and tailored to provide for suits under the Federal Tort Claims Act for medical or dental malpractice that occurs in Government hospitals during peacetime situations. H.R. 3174 does not, nor is it intended to apply to field hospitals or during time of war. Times of war are unusual situations, and that exclusion should not be tampered with. I would further point out that the bill is drafted so that cases brought under it would be subject to the applicable state tort laws; hence, it would not in any way be circumventing the numerous changes that are being made by state legislatures in the medical liability area.

It seems to me to be a matter of justice and equity that in a peacetime situation, in a Government hospital that is the equivalent of a civilian facility, our military personnel should be allowed to sue the United States for malpractice as can other citizens. In the interest of justice and equity, I urge your Committee to move this bill to the floor.

Senator GRASSLEY. Could I maybe ask one question before I have to vote? It is my understanding that your legislation limits the ability of active-duty servicemen to sue for negligence in that it covers only medical cases. What is the rationale for that, of not including all negligence? You know, why would it be any different than, for instance, a serviceman injured by a jeep because the mechanic was negligent?

Senator SASSER. Well, I think, No. 1, it allows them to sue for negligence of medical malpractice in peacetime. Now, I think physicians and those who administer health care should be held to a much higher standard of care than, to use the Chairman's analogy here, a jeep mechanic or someone of that sort.

In other words, when the serviceman enters the military medical structure, he is placing his body and life and, in essence, he is relying on the skills of the physician and in that instance I think a higher standard of care should be involved.

Also you have the question of morale. I think the feeling is that a serviceman can look out for himself on routine active duty, but you cannot do that in an operating room or in a physician's office. They simply do not have the skills or the expertise to do that.

Senator GRASSLEY. You are still going to have a group of second-class citizens, though, in the sense that they may be hurt by some other negligence, military negligence, and cannot sue.

Mr. GLICKMAN. If I may just comment on that, I think that you do give up something in the military and the normal bar against suits arising out of the course and scope of employment is understandable, such as operating the jeep, in that situation there is something that you basically give up, but that is an activity uniquely related to your job. You are in the service to drive around in a jeep and to do your job.

When the question is going in for elective surgery in a hospital and being subject to malpractice, is that something you give up because of your job? I do not think so. I think that falls into a totally different kind of category.

Then you ask the question, well, but, Mr. Glickman or Senator Sasser, you have got a compensation scheme to pay for people in those kind of circumstances. I think that you will find from our hearing record that the compensation scheme is totally inadequate to take care of many of the scenarios involving people in these kinds of circumstances.

So I say to you, it is different than operating a jeep during circumstances arising during the course of employment because there are some factors in the military and that you just assume as part of the risk, there are others you do not.

Going into the hospital and being subject to somebody who may butcher you or engage in some sort of military malpractice involves no choice on your part, none whatsoever. I think that is another situation.

Senator GRASSLEY. The Feres doctrine comes, though, from a case where a military person died in a barracks fire. I don't think that person assumed that risk.

I guess we will have to call a recess for 10 minutes now while we go cast our votes. I assume that you will have to——

Mr. GLICKMAN. I will probably have to run back over on the House side, but I appreciate your allowing me to testify.

Senator GRASSLEY. We will stand in recess for 10 minutes.

[Short recess.]

Senator GRASSLEY. The subcommittee will come to order.

We have Senator Heflin with us, our ranking minority member of this committee, and I would ask——

Senator HEFLIN. Thank you for the elevation, but I am not.

Senator GRASSLEY. I am sorry, Mr. Metzenbaum. Well, you have been.

Senator HEFLIN. I have been.

Senator GRASSLEY. Yes. So do you have an opening statement?

Senator HEFLIN. No; I am just here to listen.

Senator GRASSLEY. OK. We are going to immediately go to our first panel. The Hon. H. Lawrence Garrett III, who is general counsel for the Department of Defense, and Robert L. Willmore, who is Deputy Assistant Attorney General in the Civil Division of the Department of Justice.

We will start with you, Mr. Willmore. We have already heard from Senator Sasser and Congressman Glickman, but time is really moving quickly, so I hope that you can summarize in 5 or 6 minutes because I do have some questions I want to ask.

PANEL CONSISTING OF ROBERT L. WILLMORE, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; AND H. LAWRENCE GARRETT III, GENERAL COUNSEL, DEPARTMENT OF DEFENSE, ACCOMPANIED BY JARRETT CLINTON

Mr. WILLMORE. I will stay within that time limit.

Senator GRASSLEY. Thank you.

Mr. WILLMORE. I appreciate the opportunity to appear before the subcommittee to present the views of the Department of Justice on the application of the Feres doctrine to medical malpractice cases by military personnel. I request that my more detailed and lengthy statement be included in the record.

The Department of Justice, as the statement makes clear, is strongly opposed to the enactment of either S. 489 or H.R. 3174. We cannot support the abolition of the Feres doctrine. In sum, we do not believe that there is any need to abolish the Feres doctrine in medical malpractice cases, in that servicemen are entitled to compensation under existing Department of Defense and Veterans' Administration programs.

Second, we are concerned that the abolition of the Feres doctrine would lead to intra-military lawsuits that would have a very adverse effect on military order, discipline and effectiveness, as well as lead to nonuniform treatment of military personnel.

Finally, we believe that such legislation would set an undesirable precedent that would be extremely difficult to restrict medical malpractice cases and thereby might seriously undermine the overall viability of the Feres doctrine.

As the subcommittee knows and as explained in greater length in my prepared statement, the Feres doctrine is a result of three cases decided by the Supreme Court in 1950 which have been re-

peatedly reaffirmed by the Court since then, most recently in the last term.

Two of the three cases decided in 1950, the *Jefferson* case and the Griggs case, in fact were medical malpractice cases. The Supreme Court has focused on three reasons for why the Feres doctrine needs to be part of our law, and these reasons continue to be controlling to this day.

First, the Court noted the existence and availability of no-fault compensation for servicemen. Second, the Court it was very concerned about the adverse effect of such tort litigation on military order, discipline and effectiveness. Finally, the Court noted the distinctly Federal relationship between the Government and its servicemen and the unfairness that would result in the application of nonuniform State law under the Federal Tort Claims Act.

It is important to note that the Feres doctrine is but one element of a compensation package available to servicemen, which on the whole is far more generous, evenhanded and fair than compensation available to private citizens. This is because servicemen—unlike their civilian counterparts—who suffer serious adverse consequences from medical care, generally are eligible for compensation whether or not those consequences are a result of substandard medical care.

Accordingly, from the perspective of all servicemen who suffer adverse consequences from medical care, the existing system of compensation—by compensating all such servicemen, rather than a handful, who can show a causal link between their condition and substandard medical care—is in many ways superior to what many, if not the vast majority of servicemen, would receive if they were private citizens.

We also would note that this legislation would have the ironic effect of massively increasing the Government's exposure to medical malpractice claims to be tried under the existing tort system at the very time that that system is in the state of crisis.

Simply put, the current medical malpractice tort system is rapidly losing credibility as an efficient and fair means for resolving medical malpractice claims, and there is growing concern that the system may be doing more harm than good as it presently operates.

The troubled state of medical malpractice litigation was most recently documented by the report of the tort policy working group, on which Mr. Garrett and I both serve, on the liability insurance crisis. The report indicates, for example, that one verdict reporting system shows that the average medical malpractice jury verdict has increased from $220,000 in 1975 to over $1 million in 1980, a nearly five-fold increase far in excess of the rate of inflation during this period.

Million dollar medical malpractice jury verdicts reported by the service increased from 3 in 1975 to 71 in 1984. The number of medical malpractice cases filed in Federal district court—only the tip of the iceberg of such litigation—increased from 633 in 1976 to 1,779 in 1985, an almost threefold in only a decade. The number of medical malpractice lawsuits per 100 physicians more than doubled from 1976 to 1981, and for obstetricians and gynecologists actually tripled during this period.

The Nation thus finds itself in a period of crisis with regard to medical malpractice litigation, a crisis that for the private sector not only threatens the availability of needed health care to many citizens, but which imposes substantial costs upon both the consumer of health care and the American taxpayer. This thus seems a most inopportune time to be expanding the liability of the United States, the nation's largest health care provider.

Rather than overruling the Feres doctrine as it applies to medical malpractice claims, we strongly urge the subcommittee to consider other reforms of the Federal Tort Claims Act with regard to all medical malpractice claims against the Government. These reforms, which we believe address obvious and immediate problems, can be found in the administration's Federal Tort Claims Reform Act which it has submitted to Congress. The bill has been introduced in the Senate by Senator Mitchell McConnell, S. 2440.

Among other reforms, the bill would prohibit joint and several liability except where the United States has acted in concert, it would cap noneconomic damages such as pain and suffering and mental anguish, it would require that certain sources of collateral compensation be taken into account to prevent double recovery, it would insure that economic damages be paid periodically rather than in a lump sum, and it would provide that permissible attoreys fees be scheduled to decreased on a sliding scale as awards increase.

We believe that in light of the extraordinary explosion of tort litigation, including medical malpractice litigation, which has occurred in recent years, the need for such reform seems far more pressing than the enactment of S. 489 or H.R. 3174. I appreciate this opportunity to present the views of the department and will be pleased to answer any questions.

[The prepared statement of Mr. Willmore follows:]

Prepared Statement of Robert L. Willmore

I am pleased to appear before the Subcommittee today to present the views of the Department of Justice on S. 489 and H.R. 3174, two bills "to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care."

These bills would permit claims against the United States under the Federal Tort Claims Act for the personal injury or death of a member of the Armed Forces serving on active duty when the claim arises out of medical or dental care furnished in a Department of Defense hospital. If enacted, these proposals would overrule a sound, long-standing and viable rule of law known as the Feres doctrine for military hospital medical malpractice claims. The Department of Justice opposes these bills, and urges that they not be enacted.

Since these bills so directly impact upon the Feres doctrine, an explanation of the doctrine is in order. The doctrine derives its name from the case of Feres v. United States, 340 U.S. 135, which was decided by the Supreme Court in 1950. The Supreme Court there held that a member of the uniformed services cannot sue the Federal Government, another serviceman, or a civilian government employee in tort for injuries received which arise out of or are in the course of activity incident to his military service. There are three reasons for the doctrine:

(1) The existence and availability of a separate, uniform, comprehensive, no-fault compensation scheme for military personnel;

(2) The effect upon military order, discipline, and effectiveness if servicemen were permitted to sue the government or each other; and,

(3) The distinctly Federal relationship between the government and members of its Armed Services, and the corresponding unfairness of

permitting service incident claims to be determined by nonuniform local law.

It is important in this regard to understand the legal context of the Feres doctrine. The United States, as sovereign, is immune from suit unless it has consented to be sued, United States v. Sherwood, 312 U.S. 584 (1941), and the United States may define the terms and conditions upon which it may be sued. Soriano v. United States, 352 U.S. 270 (1957). Prior to adoption of the Federal Tort Claims Act, suit against the United States for money damages respecting torts committed by Federal employees acting within the course and scope of their employment was precluded by the doctrine of sovereign immunity. The Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671, et seq.), as enacted, constituted a waiver of sovereign immunity, with certain specific limitations. United States v. Sherwood, supra; Carr v. Veterans Administration, 522 F.2d 1355 (5th Cir. 1975); Childers v. United States, 442 F.2d 1299 (5th Cir. 1971); Simon v. United States, 244 F.2d 703 (5th Cir. 1957).

With the Feres case in 1950, the Supreme Court was called upon to decide whether the Federal Tort Claims Act was intended to waive that aspect of sovereign immunity which concerned the relationship between soldiers and their government. Feres was decided along with two companion cases, Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), and Griggs v. United States, 178 F.2d 1 (10th Cir. 1949). In Jefferson, the plaintiff, while in the Army was required to undergo an operation which, it was discovered after his military discharge, was performed negligently. In Griggs, an executrix alleged that, while the decedent was on active duty, he met his death because of the negligent and unskilled medical treatment of Army surgeons. In Feres, the executrix of Feres sued to recover for the alleged negligence of the Army in quartering him in a barracks known, or which should have been known, to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch. The decedent had died in a barracks fire while on active duty.

The common fact underlying each case was that each claimant, a serviceman on active duty, sustained injury due to the action or inaction of others in the Armed Forces. I specifically note that two of the cases concerned alleged medical malpractice.

Reflecting upon the state of the body of law from which the Federal Tort Claims Act carved a limited exception, the Supreme Court stated:

> We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.

340 U.S. at 141, and concluded:

> . . . that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Ibid. at 146.

The holding of Feres has been broadly and persuasively applied by the courts and has now stood for thirty-five years without either legislative or judicial alteration. It is even stronger today as a result of the reaffirmation of its rationale by the Supreme Court in United States v. Shearer, 473 U.S. ___, 105 S.Ct. 3039 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), reh. den., 434 U.S. 881.

FERES POLICY FACTORS

The first of the three reasons or policy factors, mentioned above, underlying the Feres doctrine is the availability of a viable alternative to damage suits in the form of statutory compensation. The present scheme has several components. First, Congress had established a comprehensive disability retirement system for service members permanently injured in the line of duty. See 10 U.S.C. §§ 1201 and 1401. Moreover, should a service member leave the service without seeking disability retirement, he or she may later request it. For example, Section 1552 of Title 10, United States Code, provides that the Secretary

of the Army, acting through the Army Board for the Correction of Military Records (ABCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice. The implementing regulation requires the ABCMR to "consider all applications properly before it for the purpose of determining the existence of an error or injustice," and to make recommendations for correction if warranted to the Secretary of the Army. 32 C.F.R. § 581.3(b)(2), (1974); Army Regulation 15-185, paragraph 4. If a former service member were to demonstrate to the ABCMR that he suffered permanent disability as a result of a service-related injury, the ABCMR could recommend that his records be amended to reflect retroactive, permanent disability retirement. Such an amendment would create a right to both backpay and continuing annuity with benefits.

Second, the Veterans Benefits Act provides another system of medical care, disability and death benefits for the service disabled veteran and his family. 1/ (A veteran eligible for both veterans disability benefits and military disability retirement benefits must choose which one to receive.) In addition, a member of the uniformed services on active duty receives free medical care when injured or ill. See 10 U.S.C. §§ 3721, 6201, and 8721. He or she also receives unlimited sick leave with full pay and allowances until well or released from active duty. Survivors of servicemen are entitled to death gratuity benefits which include six months of base pay (10 U.S.C. §§ 1475-1482), as well as unique, subsidized insurance or insurance-type plans. 10 U.S.C. § 1447, et seq.; 38 U.S.C. § 765.

The Supreme Court in Feres stressed the fact that the Federal Tort Claims Act "should be construed to fit so far as will comport with its words, into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole," 340 U.S. at 139, and that it was thus highly relevant that Congress had already provided, "systems of simple, certain, and uniform compensation for the injuries or

death of those in the Armed Services." 340 U.S. at 144. The Supreme Court in Feres and the lower Federal courts through the years have forcefully emphasized that the benefits available under the statutory system developed by Congress were not only adequate and comprehensive, but also compared extremely favorably with those provided by most workers' compensation statutes. Zoula v. United States, 217 F.2d 81, 84 (5th Cir. 1955). In 1977, the Supreme Court reaffirmed this consideration in the Stencel case, supra, by stating:

> A compensation scheme, such as the Veterans Benefits Act, serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." [Citation omitted.] Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see Feres, 340 U.S. at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries.

431 U.S. at 673.

The compensation scheme even prompted one court to comment as follows:

> The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. All we deny plaintiff appellant is a remedy he likes better.

Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965). 2/

The second consideration that has led to the broad application of the Feres doctrine by all Federal courts through the years can be understood as an aspect of the traditional reluctance of American courts to intervene in military affairs, and the reluctance of the Congress to force such intervention. In Orloff v. Willoughby, 345 U.S. 83 (1953), the Supreme Court stated:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism, or other objectionable handling of men. But judges are not given the task of running the Army. . . . The military constitutes a specialized community

> governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

345 U.S. at 93-94.

Similarly, in United States v. Brown, 348 U.S. 110, 112 (1954), the Court said:

> The peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court (in Feres) to read the Act as excluding claims of that character.

Simply put, Feres' prohibition of intramilitary tort litigation derives from society's most elemental instinct: self-preservation through a strong military. For the military to be an effective fighting force, "[n]o question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other." In re Grimley, 137 U.S. 147, 153 (1890). Accord, Brown v. Glines, 444 U.S. 348 (1980).

This consideration applies even where the issue is not military discipline in the strict sense. United States v. Lee, 400 F.2d 558 (9th Cir. 1968). What, in reality, is sought to be avoided is the general judicial intrusion into the area of military performance. See Mattos v. United States, 412 F.2d 793 (9th Cir. 1969); Callaway v. Garber, 289 F.2d 171 (9th Cir. 1961), cert. denied, 368 U.S. 874. In Henninger v. United States, 473 F.2d 814 (9th Cir. 1973), a medical malpractice case of relevance to the instant proposals, the plaintiff had elective surgery just prior to being released from the service. He argued that since the operation was performed after he had been processed for discharge, permitting him to sue for injuries incurred during its course could not have the undesirable consequences feared by the

Supreme Court. The appeals court rejected this argument, stating:

> To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task, as Henninger concedes. The proximity of the injury to discharge would be only one factor. Whether it resulted from an allegedly negligent order would be another. Whether it was caused by totally unrelated military personnel would be yet a third. In short, nearly every case would have to be litigated and it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs. . . . This is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so because servicemen injured incident to their service are entitled to Veterans' benefits.

Ibid., at 815-816 (citations and footnotes omitted). See also Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965); Camassar v. United States, 400 F. Supp. 894 (D. Conn. 1975), aff'd, 531 F.2d 1149 (2d Cir. 1976); Knoch v. United States, 316 F.2d 532 (9th Cir. 1963).

S. 489 and H.R. 3174 would blur the "clear line" that currently exists under the law. They would create an exception to application of a principle that now applies to virtually all facets of active duty, including recreation, Haas v. United States, 518 F.2d 1138 (4th Cir. 1975), off-hours secondary employment on a military base, Miller v. United States, 643 F.2d 481 (8th Cir. 1981) (en banc), and the activities of reservists, United States v. Carroll, 369 F.2d 618 (8th Cir. 1966). Passage of S. 489 or H.R. 3174 would undoubtedly lead to a plethora of other proposals seeking additional exceptions to the doctrine, casting the law into uncertainty and, perhaps, leading to the evisceration of much if not the entire Feres doctrine. Moreover, the courts might view enactment of either bill as an invitation to judicial assault, with potentially the same result.

The third policy consideration, the Federal nature of the relationship and the absence of analogous private liability, led the Supreme Court in Feres to conclude that a serviceman's suit failed to state a claim under the Federal Tort Claims Act language

which provides, "The United States shall be liable in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. § 2674. On this point, the Supreme Court, in Feres stated:

> Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the government vests in echelons of command.

340 U.S. at 141-142.

> Without exception, the relationship of military personnel to the Government has been governed exclusively by Federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

Ibid., at 146.

An analogy to various state workers' compensation statutes which preclude suit by covered workers injured in the course of employment also comes to mind. United States v. Lee, 400 F.2d 558 (9th Cir. 1968). The Supreme Court in Feres recognized the relationship existing between the United States and its military personnel as one "distinctively federal in character," and that application of local law to that relationship by virtue of the Federal Tort Claims Act would be completely inappropriate. 340 U.S. at 143. 28 U.S.C. § 1346(b). The fact that the location of the injury should determine the law to be applied "makes no sense and is unfair to the soldier who has no choice as to his location, particularly because of wide variances in local law." United States v. United Services Automobile Association, 238 F.2d 364, 366 (8th Cir. 1956). This is particularly so for the individual soldier who is a prospective defendant in a tort case, as well as for the United States itself.

While it sometimes is argued that the Feres doctrine is unfair to servicemen who are the victims of medical malpractice, the Feres doctrine in fact is but one element of a compensation package available to servicemen which, on the whole, is far more

generous, even-handed, and fair than compensation available to private citizens. This is because servicemen, unlike their civilian counterparts, who suffer serious adverse consequences from medical care generally are eligible for compensation whether or not those consequences are the result of substandard medical care. While, in certain cases, the compensation may be somewhat less than what might be available in a medical malpractice lawsuit (just as workers' compensation systems generally provide lower benefits for work-related injuries than what may be available through tort litigation), the fact is that all of these servicemen are eligible for such compensation rather than only a small handful who in fact can show a causal link between their condition and substandard medical care. Accordingly, from the perspective of all servicemen who suffer adverse consequences from medical care, the existing system of compensation is in many ways superior to what they would receive if they were private citizens.

Veterans' disability payments are also, in one important respect, more precisely compensatory for lost income than are lump-sum awards of tort damages. Monthly payments to veterans rise or fall in response to actual changes in levels of disability and continue throughout their lifetimes while disability persists. In this way, recompense more accurately tracks actual disability than do lump-sum awards which are necessarily based upon estimates of longevity and future disablement.

We believe that the policy considerations outlined above are as valid today as when first articulated. Indeed, with suits against the government and individual Federal officers increasing in numbers every year, the rationale for the Feres doctrine appears to be even more compelling today.

FERES REAFFIRMED

The Supreme Court has had occasion to consider the Feres doctrine three times in the last nine years. In each instance it has reaffirmed the doctrine and precluded judicial interven-

tion in the military relationship through the vehicle of tort litigation.

In Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), the Supreme Court ruled that third-party actions against the United States arising from injuries to servicemen are barred by Feres. A third-party action is one where the original defendant in a case, in turn, sues a party who was not sued by the plaintiff asserting that the additional party is really responsible for the plaintiff's injuries. The Court in Stencel held that the same policy reasons for the Feres rule apply to third-party actions filed against the United States. The Court stated:

> To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: "To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." Laird v. Nelms, 406 U.S. 797, 802 (1972).

431 U.S. at 673. Had the Supreme Court held otherwise, the protections intended to be afforded by the Feres doctrine would have been lost through the device of the third-party suit. The Stencel decision confirms the soundness of the Feres doctrine. Trial of tort claims filed by military contractors against the United States founded upon the alleged acts or omissions of military personnel would "involve second-guessing military orders and would often require members of the Armed Services to testify in Court as to each other's decisions and actions. This factor, too, weighs against permitting" suits. Ibid., at 673.

In Chappell v. Wallace, 462 U.S. 296 (1983), the Supreme Court held that the policies underlying the Feres doctrine also bar suit by servicemen against other servicemen for constitutional torts. In that case, plaintiffs alleged that their superior officers had discriminated against them because of their race. The Court held the suit barred, concluding that:

> The special nature of military life--the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel--would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. [Id. at 304.]

In Shearer v. United States, 473 U.S. ___, 105 S.Ct. 3039 (1985), the Supreme Court held that the Feres doctrine barred suit against the government for the off-base, off-duty murder of one serviceman by another. The government knew that the murderer had been convicted of a prior manslaughter overseas. The Court concluded that plaintiff's allegation of negligent personnel practices relating to the murderer and its failure to warn others about him "strike[] at the core of the[] concerns" that "the suit requires the civilian court to second-guess military decisions" and "the suit might impair essential military discipline. . . ." Id. at 3043 (citations omitted). The Court ruled these claims, like those in Feres and Stencel:

> did not fall within the Tort Claims Act because they were the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondents' attempt to hale Army officials into court to account for their supervision and discipline of [the serviceman murderer] must fail. [105 S.Ct. at 3044, emphasis by Court.]

FERES IS SOUND POLICY

As the Supreme Court recognized in Shearer:

> [i]n the last analysis, Feres seems best explained by the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." United States v. Muniz, 374 U.S. 150, 162 (1963), quoting United States v. Brown, 348 U.S. 110, 112 (1954).

105 S.Ct. at 3043; also quoted in Chappell v. Wallace, 462 U.S. 296, 300 (1983); and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-672 (1977). Enactment of H.R. 1161 would seriously undermine this crucial relationship.

As a matter of policy, the Supreme Court's analysis is clearly correct and should not be altered by legislation. If S. 489 or H.R. 3174 became law, military personnel would be required to testify against one another on matters relating to job performance of tort plaintiffs prior to, and after, alleged acts of malpractice. Litigation of damages issues would place military personnel directly involved in the litigation at opposite ends of an adversarial process being conducted by civilian attorneys in civilian courts. It would sow dissension by placing military witnesses in the position where they would be perceived as either helping or hurting, for good reasons or bad, the suits brought by their fellow servicemen. Scheduling appearances at trial and pre-trial proceedings would disrupt normal military operations and would require substantial logistical effort to bring principals and witnesses to court from overseas assignments, ships at sea, or long scheduled military exercises. The pendency of suit would also provide a colorable basis for personnel who do not want to accept new assignments to seek delay of any change in their status either from their military superior or the federal judge before whom their case is pending. Thus, we believe that enactment of S. 489 or H.R. 3174 would seriously disrupt the "peculiar and special relationship" between the servicemen and the military.

Moreover, enactment of S. 489 or H.R. 3174 would not, on balance, provide a better remedy for servicemen whose medical outcomes are disappointing. Under the present system, if the result of a medical procedure is not favorable, the serviceman is entitled to continued care and benefits without any showing of fault on behalf of his doctors. Under the tort system, however, the serviceman would be required to prove that his injuries were caused by malpractice. Absent proof of negligence, there would be no recovery.

In addition, this legislation would have the ironic effect of massively increasing the government's exposure to medical

malpractice claims to be tried under the existing medical malpractice tort system at the very time that that system appears to be in a state of crisis. Simply put, the current medical malpractice tort system is rapidly losing credibility as an efficient and fair means for resolving malpractice claims, and there is growing concern that the system may be doing more harm than good as it presently operates.

The problems of the current system have manifested themselves most clearly and immediately in the context of the malpractice claims crisis resulting in enormous discontinuities in the availability of adequate liability insurance and in rapidly increasing premium costs. In some states, for example, the annual cost of liability insurance for certain medical specialties now exceeds $100,000--effectively foreclosing those specialties to many younger physicians who have not yet developed a large enough practice to afford such premiums. One recent American Medical Association study reports that three times as many malpractice claims are filed today as were filed a decade ago, and that claimants are receiving record awards. This is particularly disturbing in light of the fact that medical care has improved substantially in the United States during the same period. In addition to these concerns is the problem that the malpractice crisis has led to so-called defensive medicine--that is, the use of unnecessary tests and procedures in order to minimize the physician's liability exposure--that the AMA estimates as adding $15 to $40 billion annually to American health care costs.

The troubled state of medical malpractice was most recently documented in the Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February, 1986). The Report indicates, for example, that one verdict reporting system shows that the average medical malpractice jury verdict has increased from $220,018 in 1975 to $1,017,716 in 1985, a nearly

five-fold increase far in excess of the rate of inflation (the dollar lost approximately half its purchasing power during this period). Million-dollar medical malpractice jury verdicts reported by this service increased from three in 1975 to 71 in 1984. 3/ The number of medical malpractice cases filed in federal district court--only the tip of the iceberg for such litigation (but which reflects all such cases filed against the United States)--increased from 633 in 1976 to 1,779 in 1985, an almost three-fold increase in only a decade. 4/ The number of medical malpractice lawsuits per 100 physicians more than doubled from 1976 to 1981, and for obstetricians/gynecologists actually tripled during this period. 5/

The Nation thus finds itself in a period of crisis with regard to medical malpractice litigation--a crisis that for the private sector is not only threatening the availability of health care to many citizens, but which is imposing substantial costs upon both the consumers of health care and the American taxpayer. This seems a most inopportune time to be expanding the liability of the United States, the largest health care provider of the Nation.

There thus appears to be something disturbing about the existing state tort law system for resolving medical malpractice claims. A number of state legislatures are actively considering legislative proposals to remedy some of the most serious problems. Considering this growing recognition that the current tort system does not work well--in fact, appears to be counterproductive in achieving the best health care at the best price--it is not appropriate now to abandon a Federal system which is operating well in favor of a state system that has serious problems.

Finally, Mr. Chairman, we oppose S. 489 and H.R. 3174 as a matter of sound fiscal policy. In the present and foreseeable era of thinly spread Federal resources and budget austerity, it makes little sense to open another door to financial liability

of the United States when there exists in place a functioning, alternative scheme of compensation.

Accordingly, it is the view of the Department of Justice that the Feres doctrine is a sound and necessary rule of immunity which permits the Armed Services to be free to go about their mission of defending the country. At the same time, the remedies available as an alternative to lawsuits, which we have previously outlined, provide a means for meaningful redress and compensation for those who are injured in the course of military service.

Rather than overruling Feres, we strongly urge the Subcommittee to consider other reforms of the Act with regard to all medical malpractice claims against the United States. These reforms-which we believe address obvious and immediate problems--can be found in the Administration's bills which it has submitted to the Congress which would make some needed and sensible reforms to the Federal Tort Claims Act. The bill has been introduced by Representative Tom Kindness in the House as H.R. 4770, and by Senator Mitch McConnell in the Senate as S. 2440. The bills' provisions of immediate relevance to medical malpractice, would amend the Federal Tort Claims Act to include the following reforms:

- The United States would not be held jointly and severally liable except where it has acted in concert with another tortfeasor.
- Non-economic damages such as pain and suffering and mental anguish available under the Act would be limited to a maximum of $100,000.
- Certain collateral sources of compensation provided by the government or any employer would be off-set against a FTCA judgment to avoid double recovery at the expense of the taxpayer.
- Awards for economic damages under the FTCA

could be paid periodically--that is, as they actually accrue--rather than in the form of a lump-sum payment made perhaps decades before the actual economic damages manifest themselves. And,

- Permissible attorneys' fees would be scheduled to decrease on a sliding scale as FTCA awards increase.

The Administration strongly urges that the Subcommittee address the broader concerns involving medical malpractice claims, and carefully consider the above reforms if the FTCA is amended. Indeed, we believe that in light of the extraordinary explosion of tort litigation--including medical malpractice litigation--which has occurred in recent years, the need for such reforms seems far more pressing than enactment of S. 489 or H.R. 3174.

I appreciate the opportunity to present the views of the Department of Justice on this legislation. I will be pleased to answer any question you may have.

Senator GRASSLEY. Just one question before you go, because it is immediate now. You stated that we ought to look at some other legislation, including S. 2440. Let us just suggest that maybe this committee might approve one of these two malpractice bills that are before us. Suppose we were to attach S. 2440 to that, would the department approve that?

Mr. WILLMORE. I think we would still have to oppose it, Mr. Chairman, because we really believe that if this committee were to adopt one of the two bills, it would do very serious damage to the Feres doctrine, and that that damage would go beyond medical malpractice.

We are seeing that some appellate courts are beginning to chip away at the Feres doctrine. There are also other applications that are being challenged in the legislative context. If either S. 489 or H.R. 3174 passes, we would be very concerned for the future viability of the Feres doctrine.

On the other hand, if this committee is going to pass one of these two bills over our objection, we feel that given the existing state of medical malpractice litigation, it is essential that these reforms be included.

Senator GRASSLEY. Well, since there is a little light at the end of that tunnel, we will keep in contact with you.

Dr. Garrett.

Mr. GARRETT. Actually, it is Mr. Garrett. Thank you very much.

Senator GRASSLEY. I have just promoted you, if having a Ph.D. is a promotion or an M.D., but whatever the situation is. It says doctor.

Mr. GARRETT. Thank you very much, Mr. Chairman.

First, I would like to introduce Dr. Jarrett Clinton, who is the Deputy Assistant Secretary of Defense for Professional Affairs and Quality Assurance, who may be able to answer some of the specific questions you may put before us.

I thank you, too, for this opportunity to present the views of the Department of Defense on S. 489 and S. 3174, bills that would modify the Feres doctrine by permitting active-duty military personnel to sue the United States under the Federal Tort Claims Act for medical malpractice.

I have submitted a prepared statement and ask that it be included in the record of this hearing. I will highlight the major points of my statement during the next several minutes.

First, I would like to associate myself with Mr. Willmore's comprehensive analysis of the development and policy of the Feres doctrine. Rather than repeating what he has said, I want to discuss with you why we think the proposed legislation is a bad idea from the standpoint of national defense.

I hasten to emphasize that all of us at the Department of Defense share Congress' concern for those who have suffered because of inappropriate medical treatment. As a result, the Department's senior military and civilian leadership continues to work hard to improve the quality of health care.

If I may inject at this point just for the record, you should know that I am also retired military, having spent 20 years as an enlisted man and as an officer. I have been subject to military medical

care over that period, so I can testify both from a personal as well as a policy point of view.

Our highest priority is to insure that the morale and motivation of military personnel to serve remains high. Unquestionably, one of the essential ingredients for maintaining disciplined, motivated armed forces is fair compensation for service-connected injuries. The key issue before us, however, is whether modifying Feres in medical malpractice cases would further the legitimate ends of discipline, morale and fair compensation or, instead, whether it would cause more problems than it would solve. We strongly believe that the latter is the case.

The implications of retrenching the Feres doctrine are more extensive than a cursory examination would suggest. They go far beyond providing tort remedies for injuries. Numerous administrative actions and command decisions are directly dependent upon medical determinations made in hospitals operated by components of the Department of Defense.

Several hypothetical cases illustrate the potential for misplaced attacks upon military decisions through the Federal Tort Claims Act suits that would be authorized by the proposed bill.

Consider, if you will, the following: A pilot is physically disqualified from flying status and sues the Air Force, alleging that his disqualification was based on a negligent medical error. The pilot asserts that he or she has suffered career impairment, economic loss, and emotional distress. In such a case, medical standards are inextricably woven into the military assignment process. The courts would be, in my opinion, an inappropriate forum to challenge such personnel assignment decisions through the type of tort litigation the proposed legislation before you would encourage.

Another example would be a service member being administratively separated for a medically diagnosed personality disorder who sues, again alleging medical malpractice. Unavoidably, the resulting Federal tort litigation would adversely affect the orderly conduct of the service's administrative processes. It is in my opinion unwise in such cases to superimpose litigation under the Federal Tort Claims Act upon administrative procedures that are efficient, effective, and already provide due process of law.

And last, we have an example of an officer who may be disqualified from nuclear weapons duty following a medical examination and treatment, who sues, alleging physical injury, emotional distress, and economic damages caused by medical malpractice. The question is should we subject the selection of personnel for highly sensitive duties to protracted and unpredictable tort litigation. We believe not.

The list of examples shows that practically all military medical decisions in the United States and the administrative actions that flow from them would become fair game in tort suits under the proposed bills.

Military personnel decisions would be seriously impaired whenever they have a medical aspect, remaining in limbo for lengthy periods until judicially resolved.

We feel that one of the principal morale benefits of the existing compensation system is that comparable situations are treated uniformly. The proposed legislation threatens this principle and seeks

to replace it with special dispensation based upon the circumstances and situs of injury. The bills before you apply only to those malpractice, claims that occur in medical facilities in the United States. They do not allow suits for incidents that occur outside these facilities, such as on-board an aircraft carrier or on a medical evacuation flight.

These bills, moreover, provide a remedy only for malpractice, but not for other forms of negligence. If a soldier loses a leg on field maneuvers, on the base in a driving accident, or in the hospital at the hands of a surgeon, he or she has the same injury. To provide special dispensation for one medical injury while denying it for another equally painful and debilitating loss will not promote either the appearance or the reality of fairness.

Instead of overruling Feres, we fully support a compensation system that is equitable, just, and reflects current economic conditions. Congress has made the Federal Employees Compensation Act and the Longshore and Harbor Workers' Compensation Act exclusive remedies for injuries to covered personnel.

Similarly, we urge Congress to maintain the existing exclusive compensation system for all service-connected injuries, including those resulting from military medical malpractice. This will have a far more positive effect on morale than creating a special class of claimants whose rights to claim depend upon where and how they were injured and not on the injury they suffered.

The proposed legislation is grounded partially upon a perception that military medicine is in a state of crisis and requires immediate action to remedy its shortcomings. This, we believe, is incorrect.

When military medical care is compared with its civilian counterpart, there is no evidence of which I am aware that military care is less carefully administered. Indeed, the statistics show that fewer people claim malpractice by military practitioners than civilian providers. Nor has military medicine experienced anything close to the increase in malpractice claims experienced in the civilian sector, even allowing for the claims that would have been filed by Feres-barred personnel.

Some supporters of the proposed legislation may contend that if a suit is filed, the negligent practitioner will correct his or her behavior to avoid paying another judgment and defending another case. This deterrent theory is suspect, I believe, for two reasons.

First of all, the traditional purposes of private tort law in our jurisprudence have been to compensate, to make whole, and to deter. The punitive, or deterrent, feature of tort law expressly was made inapplicable to the United States in the Federal Tort Claims Act itself.

Second, when malpractice claims are filed against military physicians, they are immunized from suit under 10 U.S.C., section 1089. This immunity is essential, we believe, to recruit and retain physicians.

Since military physicians do not have to pay malpractice judgments out of their own pockets, the deterrent effect ascribed to permitting more lawsuits is, I believe, nonexistent.

Medical malpractice suits under the Federal Tort Claims Act are currently permitted for approximately 75 percent of the patient population served by military medical facilities who are military

retirees and dependents of active-duty and retired personnel. It challenges credibility to assert that increasing the potential claim and litigation load by 25 percent would achieve any beneficial effect upon the quality of health care.

Any argument that military physicians provide better care to those who may sue for malpractice is, I believe, a gratuitous insult to this dedicated group of officers who are bound by the same ethical requirements in treating all of their patients.

The key to improving health care and minimizing malpractice is quality assurance, not more lawsuits. The Department of Defense has made great strides in creating mechanisms to identify and correct quality assurance problems. Recent initiatives, as testified to earlier, include regulations setting standards for providers' performance and establishing stricter standards for awarding clinical privileges. The Department has also contracted with an independent review organization to examine our quality assurance efforts.

If I may briefly recapitulate, Mr. Chairman, the notion of military personnel suing in tort runs counter to the accumulated wisdom and experience of all three branches of Government. Enacting either S. 489 or H.R. 3174, thereby creating the right to sue for malpractice, will, in my opinion, open a Pandora's box of a host of unforeseen problems in the litigation area.

Such a law would affirmatively threaten morale, as it would create a special class of claimants favored over all others. Military medicine is not in a state of chaos and disrepair. The Congress should not override the well-established proscription against tort suits by active-duty military personnel.

Tort suits have never stopped or even diminished malpractice. Instead, the Department of Defense should be encouraged to push forward with aggressive quality assurance measures and with holding physicians accountable for their actions. These mechanisms are far more effective than a judgment paid by the Treasury, because our quality assurance and accountability programs benefit the entire patient population, not just those who win a lawsuit.

A compensation scheme, of course, already exists that can fairly compensate all injured persons, regardless of the cause of the negligence. If that compensation is inadequate, then we should review it and correct it.

Thank you, Mr. Chairman. I would be happy to respond to any questions the subcommittee may have.

[The prepared statement of Mr. Garrett follows:]

Prepared Statement of H. Lawrence Garrett, III

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to present the views of the Department of Defense on S. 489 and H.R. 3174, bills that would permit active-duty military personnel to sue under the Federal Tort Claims Act (FTCA) for medical malpractice in specified situations. In 1950, the Supreme Court held in Feres v. United States, 340 U.S. 135 (1950), that the FTCA does not extend to injuries of military personnel sustained incident to service, including medical malpractice.

The House of Representatives passed H.R. 3174 on October 7, 1985. My predecessor, the Honorable Chapman B. Cox, testified before the House Subcommittee on Administrative Law and Governmental Relations in July 1985. His statement set forth the history of the Feres doctrine and thoroughly examined the policy reasons for it. Similarly, today's testimony of Mr. Robert Willmore, Deputy Assistant Attorney General, Department of Justice, comprehensively addresses the legal underpinnings of the Feres doctrine. Instead of replowing this ground, I want to discuss with you why we think the proposed legislation is a bad idea from the standpoint of national defense. To that end, I will address why retaining sovereign immunity with respect to tort lawsuits by military members is important to the United States, pointing out the adverse effects that passage of the legislation would produce. Next, I will discuss why the proposed legislation is not necessary and why it will not accomplish its avowed goal of improving military medicine.

Before I begin, I hasten to emphasize that all of us at the Department of Defense share the Congress' concern for those who have suffered because of inappropriate medical treatment. As a result, the Secretary of Defense, the Assistant Secretary of

Defense for Health Affairs, the Surgeons General, the Judge Advocates General, the Inspectors General, and the audit agencies have all worked to improve the quality of health care. No one is insensitive to the needs of military men and women. Our highest priority is to ensure that their morale and motivation to serve remain high. Unquestionably, one of the essential ingredients for maintaining disciplined, motivated armed forces is fair compensation for service-connected injuries. The key issue before us, however, is whether modifying Feres in medical malpractice cases would further the legitimate ends of disciplined morale and fair compensation, or, instead, whether it would cause more problems than it would solve. We strongly believe that the latter is the case.

THE FERES DOCTRINE IS IMPORTANT.

Defining the outer limit of the FTCA, Feres holds that servicemembers injured incident to service may not sue the United States. Because of the inherently disruptive nature of litigation, the concept of a soldier suing his or her government is alien to our traditional philosophy of jurisprudence. Thus, courts have recognized the unique nature of the military and its indispensable role in preserving the nation, and have been reluctant to intrude into the military environment. Military discipline, order, and cohesiveness are not just "buzz words." Rather, they are dynamic values, vital to the effectiveness of our armed forces.

The Feres doctrine has been used in deciding recent cases that have constitutional dimensions, Chappell v. Wallace (1983) and United States v. Shearer (1985). In each case the Court barred suit. The essence of these decisions is that even when

constitutional deprivations are alleged, the remedy must reflect the unique nature of the military. This does not, of course, mean military authorities may transgress with impunity. For dissatisfied military personnel, numerous forms of redress are available within the military, in addition to the right to petition directly to the Congress and the President. Moreover, if the offensive conduct is sufficiently serious, an array of administrative actions or criminal proceedings, such as court-martial, are available to deal with transgressors. For cases of physical injury or disability, Congress has created a comprehensive compensation scheme to provide benefits -- both financial and medical -- without regard to fault.

The Supreme Court has repeatedly recognized that the zone of interests peculiar to the military requires judicial protection. We urge the Congress to continue to adopt the same approach.

The implications of retrenching the Feres doctrine are more extensive than a cursory examination would suggest. They go far beyond providing tort remedies for injuries. Numerous administrative actions and command decisions are directly dependent upon medical determinations made in hospitals operated by components of the Department of Defense.

Several hypothetical cases illustrate the potential for misplaced attacks upon military decisions through the FTCA suits that would be authorized by the proposed bills. Consider the following:

a. A pilot is physically disqualified from flying status and sues the Air Force, alleging that his disqualification was based on a negligent medical error. The pilot asserts that he or she has suffered career impairment, economic loss, and emotional distress. In such a case, medical standards are inextricably

woven into the military assignment process. The courts would be an inappropriate forum to challenge a personnel assignment decision through the type of tort litigation the legislative proposals before you would encourage.

b. A servicemember being administratively separated for a medically diagnosed personality disorder sues, alleging medical malpractice. Unavoidably, the resulting federal tort litigation would adversely affect the orderly conduct of the Service's administrative processes. It is unwise in such cases to superimpose litigation under the FTCA upon administrative procedures that are efficient, effective, and already provide due process of law.

c. An officer disqualified from nuclear weapons duty following medical examination and treatment sues, alleging physical injury, emotional distress, and economic damages caused by malpractice. Should we subject the selection of personnel for highly sensitive duties to protracted and unpredictable tort litigation? We believe not.

This list of examples is by no means exhaustive, but should serve to point out that the implications of permitting malpractice suits by active-duty members go far beyond furnishing a money-damage remedy for physical injuries. Practically all military medical decisions in the United States and the administrative actions that flow from them would become fair game in FTCA suits under the proposed bills. Military personnel decisions would be seriously impaired whenever they have a medical aspect, remaining in limbo for lengthy periods until judicially resolved.

Any medical decision might be construed to be actionable malpractice, even if administrative in nature. As noted, the

Services already have procedures available to challenge, to examine, and to correct erroneous medical judgments. Allowing malpractice suits by military personnel would exact an intolerable price for the use of medical information in making personnel decisions. We must not create an environment where a commander cannot act without looking over his or her shoulder for the process server.

Although we suggest that the inevitable entangling of administrative personnel actions and medical malpractice suits is sufficient reason not to support these bills, there are other, equally serious, disadvantages.

THE PROPOSED LEGISLATION ERODES UNIFORMITY.

One of the principal morale benefits of the existing compensation scheme is that comparable situations are treated uniformly. And make no mistake, in a military organization uniformity, consistency, and fairness are basic to the preservation of discipline, order, and cohesiveness. The proposed legislation threatens this cornerstone and seeks to replace it with special compensation based upon the circumstances and situs of injury.

The bills before you apply only to those malpractice claims that occur in medical facilities in the United States. They do not allow suits for incidents that occur outside these facilities. Thus, we are facing the possibility of one sailor being able to claim for injuries that occur at a naval hospital, while a sailor similarly injured a few miles away aboard an aircraft carrier is denied comparable relief. Or a soldier injured by medical malpractice at Walter Reed could sue, whereas another soldier in Europe, or on board a medical evacuation flight landing at

Andrews Air Force Base, could not. Selective special compensation dependent upon fortuity of location falls short of the even-handed fairness we must exercise to preserve morale.

These bills, moreover, provide a remedy only for malpractice, but not for other forms of negligence. If a soldier losses a leg on field maneuvers, on the base in a driving accident, or in the hospital at the hands of a surgeon, he or she has the same injury. This bill would significantly demean all injuries sustained in combat. To provide special compensation for the medical injury while denying it for the other equally painful and debilitating losses will not promote either the appearance or reality of fairness.

We fully support a compensation system for all service-connected injuries that is equitable, just, and reflects current economic conditions. Just as Congress has made the Federal Employees' Compensation Act and the Longshore and Harbor Workers' Compensation Act the exclusive remedies for injuries to covered personnel, we suggest Congress should maintain the existing, exclusive compensation system for all service-connected injuries, including those from military medical malpractice. This will have a far more positive impact on morale than creating a special class of claimants whose right to claim depends upon where and how they were injured and not on the injury they suffered.

If permitting tort lawsuits or providing special compensation for medical malpractice injuries would have a positive effect upon the military mission, discipline, or morale, we would see the importance of balancing adverse effects against benefits. However, we cannot discern a positive benefit to be derived from this legislation - least of all for military health care.

PERMITTING MORE LAW SUITS WILL NOT
IMPROVE MILITARY MEDICINE.

The proposed legislation is grounded partially upon a perception that military medicine is in a state of crisis and requires immediate action to remedy its shortcomings. The Report of the House Committee on the Judiciary accompanying H.R. 3174 states at page 4 that "in fact, this legislation should result in improved military medical care, because of the threat of suit." This proposition cannot withstand close analysis.

First, medical malpractice suits under the FTCA are permitted for the approximately 75 percent of the patient population served by military medical facilities who are military retirees and dependents of active-duty and retired personnel. It challenges credibility to assert that increasing the potential claim and litigation load by 25 percent would achieve any beneficial effect upon the quality of health care. Any argument that military physicians provide better care to those who may sue for malpractice is a gratuitous insult to this dedicated group of officers who are bound by the same ethical requirements in treating all of their patients.

Next, we are all aware of the ongoing malpractice liability crisis in the civilian medical community. Indeed, instead of opening new avenues for malpractice recovery, state legislatures are now passing tort reform measures designed to restrict the amount of recovery, to limit attorneys' fees, and to allow consideration of collateral recoveries in computing judgments. The point is that, notwithstanding all the malpractice suits in the civilian sector, malpractice claims are still on the rise, i.e., the threat of suit will do nothing to improve military medical care!

When military medical care is compared to its civilian counterpart, there is no evidence that military care is any less carefully administered. Indeed, the statistics show that fewer people allege malpractice by military practitioners than civilian providers. Nor has military medicine experienced anything close to the increase in malpractice claims in the civilian sector. Malpractice claims per 100 Department of Defense physicians were 6.4, 6.5, and 6.7 in 1983, 1984, and 1985, respectively. Taking into account active-duty military patients currently barred from suing by Feres, the rate would be 8.7 per 100, if we assume that they would file claims at the same rate as others receiving treatment in military facilities. During this time, claims against civilian physicians averaged 16.5 per 100 physicians, almost twice the corresponding military rate if there were no Feres doctrine.

The increase in civilian lawsuits during this decade has been substantially higher than the rise in actions involving military medical treatment facilities. Compared with a 21 percent increase for the Department of Defense, commercial insurance companies have recorded a 66 percent increase and private insurance companies a 124 percent increase, according to the American Medical Association. For example, the Physicians Insurance Company of Ohio, a private insurer with approximately 5,000 members, reported its claims increasing from 619 to 1979 to 1,107 in 1983, with a total of 3,555 claims made against its members during the four-year period.

Another indication of the quality of military medicine comes from the Joint Commission on Accreditation of Hospitals (JCAH). The 1982-1983 JCAH survey of hospitals for compliance with JCAH standards revealed that 72 percent of all military hospitals fell in the top two levels of accreditation; only 60 percent of civilian hospitals attained this standard. Furthermore, no

military facility failed accreditation, while 2 percent of the civilian hospitals did.

Some supporters of the proposed legislation may contend that if a suit is filed, the negligent practitioner will correct his or her behavior to avoid paying another judgment and defending another case. This "deterrence" theory is suspect for two reasons. First of all, the traditional purpose of tort law in our jurisprudence has been to compensate, to make whole. The punitive feature of tort law expressly was made inapplicable to the United States in the FTCA itself. Secondly, when malpractice claims are filed against military physicians, they are immunized from suit under 10 U.S.C. § 1089. This immunity is essential. Otherwise, we would be unable to recruit and retain physicians because of high malpractice insurance premiums. Since military physicians do not have to pay malpractice judgments out of their own pockets, the deterrent effect ascribed to permitting more lawsuits is nonexistent. Notably, in the civilian sector, increasingly hefty malpractice awards have not resulted in fewer suits; the exact opposite is true. More and more cases are being brought. The only evident deterrence is that physicians are discouraged from practicing in high-risk medical specialties such as obstetrics, and more and more insurers refuse to provide coverage for those who continue. No improvement in the quality of care is demonstrated.

The key to improving health care and minimizing malpractice is quality assurance, not more lawsuits. In this regard the military medical community is highly sensitive to the need for self-improvement. A physician's first rule is to do no harm to the patient. Our medical personnel are working aggressively to create an environment in which patients are not only assured of the highest quality of care, but one in which that quality is evident to them. Under the leadership of the Assistant Secretary

of Defense for Health Affairs and the Surgeons General of the Military Departments, great strides have been made in creating mechanisms to identify and correct quality assurance problems. Recent initiatives include:

(1) Setting standards for providers' performance and then monitoring for deviation from expected levels.

(2) Expanding supervision requirements for non-physician health care providers.

(3) Creating stricter standards for awarding clinical privileges and improving the screening process for prospective medical treatment facility staff members.

(4) Requiring timely action, monitoring, and follow-up where substandard care has occurred or where provider misconduct is suspected.

(5) Requiring physicians and other specified health care professionals to obtain and maintain a valid state license.

(6) Restricting the off-duty employment of health care providers to prevent distraction from their primary responsibility -- to serve Department of Defense patients.

(7) Revising emergency room guidelines to ensure that fully qualified providers are on duty.

(8) Contracting with an independent review organization to examine our quality assurance efforts.

The point of all this is that the Department of Defense is not only dedicated to providing our personnel with the best care possible, but has taken aggressive action to assure it. The

watchwords of today are "quality assurance" and "provider accountability." No lawsuit is needed or would be effective to encourage us to do better.

I do not contest the fact that antagonists of military medicine can point to regrettable incidents where criticism is warranted. But in a system that has 668 facilities, one million inpatient admissions, and 50 million outpatient visits each year, some incidents unfortunately do occur. We are aware of these and are doing all we can to prevent them. From a quality assurance standpoint, all incidents of unsatisfactory care are treated alike -- regardless of whether the injured person may sue or not. Thus, granting the right to sue to military members will not spur the Department of Defense to try harder. We are giving it a 100 percent effort today -- not because someone might sue, but because it is the right thing to do.

CONCLUSION

We in the Department of Defense are not deaf to the critics of military medicine, nor do we have a callous disregard for those who have been injured. Instead, we submit that a litigious approach to eliminating medical malpractice misses the mark and will cause serious problems for military morale and discipline.

To recapitulate:

- The notion of military personnel suing in tort runs counter to the accumulated wisdom and experience of all three branches of government.

- Enacting either S. 489 or H.R. 3174, thereby creating the right to sue for malpractice, will open a Pandora's box of problems.

- Such a law would affirmatively threaten morale, as it would create a special class of claimants favored over all others.

- Military medicine is not in a state of chaos and disrepair. The Congress should not overrule the well-established proscription against tort suits by the military.

- Tort lawsuits have never stopped or even diminished malpractice. Instead, the Department of Defense should be encouraged to press forward with aggressive quality assurance programs and with measures holding physicians accountable for their actions. These mechanisms are far more effective than a judgment paid by the Treasury, because our quality assurance and accountability programs benefit the entire patient population, not just those who win a lawsuit.

- A compensation scheme already exists that can fairly compensate all injured persons regardless of the cause of the negligence. If that compensation is inadequate, let's correct it.

The proposed legislation is an expression of concern for the plight of those who have suffered real injuries. But its premises are faulty. First, these proposals would not reduce malpractice or improve morale. Only the Department of Defense can do that as we aggressively pursue improved health care. Second, the financial objective of these bills would be best advanced by a thorough review of our no-fault benefits system, which should provide adequate, realistic compensation for service-connected injuries on a uniform basis without regard to fortuitous circumstances.

Senator GRASSLEY. First I will direct questions to Mr. Willmore, and these are meant to ferret out different treatment for different parties under the Federal Tort Claims Act. First, can a dependent or family members of active-duty military sue for military malpractice committed on them by military doctors?

Mr. WILLMORE. Yes.

Senator GRASSLEY. What is the distinction with active-duty military?

Mr. WILLMORE. The distinction is there for reasons raised by the Supreme Court. One obvious difference is that a dependent or a spouse does not have a compensation program that exists for any adverse consequences from medical care, while an active-duty serviceman does have such a compensation program. That is an immediate difference.

Also, you do not have the situation of one soldier suing another soldier, which was what in large part the Supreme Court was concerned about in its *Feres* decision and in many subsequent decisions, most recently in *Shearer* decision in the last term. Nor do you have the other problems of military discipline and effectiveness that you would have if you had soldiers suing officers as well as other soldiers for a variety of reasons.

But a key difference is that you have no compensation system for spouses or dependents, whereas for servicemen you do.

Senator GRASSLEY. Now, is there not a similar adverse effect on military discipline and order if, for example, a wife of an active-duty service person can sue the Government for negligence in medical care, in such a situation would not the service person likely testify against another fellow serviceman?

Mr. WILLMORE. There is that slight possibility, but you would not have the kind of problems, for instance, that Mr. Garrett referred to, such as the pilot who is taken off of flying status as a result of some condition or——

Senator GRASSLEY. Well, you say that it could happen but is not quite as serious a situation.

Mr. WILLMORE. That is right.

Senator GRASSLEY. But does not that say something though about the military discipline argument?

Mr. WILLMORE. No, I do not think so. I think there are many kinds of medical malpractice cases, and that is important to keep in mind. You can envision a very simple medical malpractice case which can lead you to conclude that there is no disciplinary problem in which a case. But the trouble is which there are many kinds of malpractice cases where you could have a very significant disciplinary problem or military effectiveness problem.

The pilot on flying status is a very good example of that kind of situation, and if you overrule Feres as it applies to medical malpractice cases, you overrule Feres as to all medical malpractice cases. You overrule it as to those cases which perhaps do not present such a big problem, but you also overrule it as to a whole group of cases that are going to represent very serious problems. And those who recommend the abolition of Feres for medical malpractice cases do not focus on all those medical malpractice cases that are going to present some very serious military discipline problems.

Senator GRASSLEY. Let me ask you about veterans, can they sue Government for medical malpractice due to actions of VA hospitals?

Mr. WILLMORE. To the extent that the medical care was provided after they left the service, yes. If the medical care was provided while they were in the service, and then sued as veterans, the answer would be no.

Senator GRASSLEY. Why the distinction with active military personnel?

Mr. WILLMORE. The distinction is very clear, that since veterans are no longer in the military, they are no longer subject to orders. nor are they subject to the same relationship as servicemen. And they also have a different disability program from active-duty servicemen.

Senator GRASSLEY. But remember that veterans can get benefits under the Veterans Benefits Act for injuries that they suffered.

Mr. WILLMORE. They can get some benefits, but they cannot necessarily get the same level and types of benefits that active-duty servicemen obtain——

Senator GRASSLEY. So you are saying it is the level of benefits that are different, as opposed to a compensation system?

Mr. WILLMORE. Let me give you an example, Senator. Let us say that an active-duty serviceman is run down by a car, just to give an example, while he is on base and is very seriously injured. He is entitled to very substantial military disability benefits if he is disabled as a result.

Let us say a veteran is walking down the streets of downtown Washington, DC and is run down by a car. He is not entitled to nearly the same kind of benefits or programs that the serviceman is entitled to in a similar situation. So you are talking about different kinds of benefits based on a different status.

Senator GRASSLEY. Let me ask you about another class. Can dependents or family members sue the Government based on injuries sustained by a member of the Armed Forces while that person is on active duty?

Mr. WILLMORE. No.

Senator GRASSLEY. Why not?

Mr. WILLMORE. Because the injury is incident to the active duty of the serviceman. Accordingly, not only the serviceman is precluded from suing for that injury, but his spouse and his children cannot do so.

Senator GRASSLEY. What legal remedy then do those spouse and children have?

Mr. WILLMORE. They have the legal remedies that are available under the military disability program, death benefits if the circumstances involve a death. They have the benefits that Congress has determined by statute should be provided to them.

For instance, in a medical malpractice case, if a serviceman was injured as a result of medical malpractice and he could not sue, if you did not have that restrict the ability of his dependents to sue, then his wife could sue for loss of consortium, his children could sue for other reasons, and you then really would not resolve the problem that the Supreme Court was trying to address when it created the Feres doctrine.

Senator GRASSLEY. Are those benefits adequate that the family could get under those cases?

Mr. WILLMORE. Mr. Chairman, they are the same benefits that a serviceman gets if he is injured in wartime. If we as a Nation believe that these benefits are adequate for wartime, then we would argue that they are adequate for peacetime. If a serviceman loses his leg because he steps on a landmine and he gets a certain amount of money, then Congress has determined that that is the appropriate money for that kind of an injury. If he loses his leg as a result of surgery it would be ironic, in fact I think it would say something very troubling about our entire compensation system, if we concluded that as a result of losing a leg as a result of surgery he would get inadequate compensation, but as a result of losing a leg from stepping on a landmine he would get adequate compensation, even though it is the same amount in each case.

So I cannot say whether the compensation is adequate, but it is the same.

Senator GRASSLEY. Well, can Federal prisoners injured by the medical negligence of Government employees bring an action under the Federal Tort Claims Act?

Mr. WILLMORE. Yes; they can.

Senator GRASSLEY. Now, do not our enlisted men deserve at least the same remedies as we might give to Federal prisoners?

Mr. WILLMORE. I think enlisted men have a better system than Federal prisoners. Federal prisoners do not have a compensation program. Servicemen do, and that is a very key difference.

For instance, let us say a prisoner is injured as a result of an act of negligence other than medical malpractice while he is a prisoner. He can also sue for that. A Federal non-military employee might not be able to sue under similar circumstances because of the FECA bar. A military serviceman would not be able to sue because of the Feres bar. Prisoners are in a completely different situation from either Federal civilian employees or military employees because they have no compensation program. They do not have the workers' compensation program, nor do they have the military disability or death benefits program.

Senator GRASSLEY. Mr. Garrett, in regard to military discipline, do you not see some sort of distinction between those things that are traditionally military, like battlefield training, actual combat, war games, and those things that are traditionally found in the private sector, for example, the traditional doctor-patient relationship, negligence involved with the maintenance of equipment, since the latter have little to do with the need to maintain military discipline?

Mr. GARRETT. Well, if I understand your question correctly, Mr. Chairman, I really do not see a distinction. If you want to compare the civilian sector with the military sector, clearly there is a difference. But if you are asking the question in the context of the military universe, that is, an active-duty military member who is ordered to the hospital to correct——

Senator GRASSLEY. And it is that latter that I am.

Mr. GARRETT. All right, then I see no real distinction. Most injuries occur as a result of some form of negligence, either on the part of the injured person or someone else involved. And I was listening

to Senator Sasser earlier with the jeep incident, and I do not see a distinction.

As I recall when I was on active duty, there was a situation where I had no choice. If I was ordered to undergo medical treatment to correct a wrong, I went into Balboa Hospital and got it corrected. You know, I was subject to the orders of my superiors to do that.

Senator GRASSLEY. OK. Then I think it naturally follows that since spouses and the children of active-duty military members can sue the Government for negligence and then, since retired military personnel can sue the Government, how can there be said to be a greater harm to military discipline by allowing suits by active-duty military personnel on their behalf?

Mr. GARRETT. Well, first of all I think there is a definite difference between the individual who is subject to the orders of the chain of command as a uniformed service member, as opposed to the dependents who are not, as the retired people are not. They are not within the military mainstream, they are not functioning in operational units which require unity and cohesiveness and no divisiveness, if that is possible–and it is not always possible.

And the other point, as brought out by Mr. Willmore, of course, is that the dependents and the retired people are not going to be the beneficiaries of an in-place compensation system, whereas the uniformed member will be. And I can see situations where—and that is one of the things that troubles me—where if we alter the Feres doctrine in any way, that, in my opinion, basically undermines the rationale for the doctrine in the first place and will subject it to varying judicial interpretations across the land. You are then going to run into situations where the manner in which the military units operate and the military overall will be challenged from time to time.

And consider the example which I gave of the Air Force pilot or a Navy pilot, who was ordered off of flight status and challenges his superior, his commanding officer or maybe the wing commander's decision to do that. Then everybody ends up in litigation. I do not think our people can function effectively if they are always looking for the process server over their shoulder.

Senator GRASSLEY. Well, I do not want to undermine respect for discipline or order in the military, but can we really classify the acceptance of negligence and negligent medical care as part of military discipline?

Mr. GARRETT. Can we accept it?

Senator GRASSLEY. Yes; well, basically is that not what we are being asked to do?

Mr. GARRETT. I do not think we are being asked to accept negligence and I do not think that the Secretary or anybody within the Department would accept negligence. What——

Senator GRASSLEY. Maybe I should not say that you are asking us to do that, but is not the acceptance of the status quo, that is the bottom line of the status quo?

Mr. GARRETT. Acceptance of negligence?

Senator GRASSLEY. Yes.

Mr. GARRETT. I disagree with that, Senator.

Senator GRASSLEY. I am talking about negligent medical care. That is all I am talking about.

Mr. GARRETT. I understand.

Senator GRASSLEY. Is not military discipline in fact harmed more now because in many of the cases where claims under the Feres doctrine are barred, no followup investigation takes place and the family of the service member who was a victim feels as though the military is covering up the incident or just ignoring it altogether? Remember, this was the basis of Senator Sasser's introduction of the bill in the first place.

Mr. GARRETT. Yes, sir. If I may, as to the followup, I would like to defer to Dr. Clinton.

Senator GRASSLEY. Yes, you may.

Dr. CLINTON. Senator, that may describe practices of the past, but it does not describe today by any means at all. We have looked into cases that indeed occurred over 10 years ago, simply to clear the record that, for various administrative oversight issues, had not had full investigation. All cases brought to our attention have been investigated. They are investigated at a much higher level at the hospital level, by the major commands over those hospitals, by the Surgeon General's Office and by our office. I know of no case brought to our attention that lies uninvestigated. That simply is not being done.

Senator GRASSLEY. OK. You know, I am in no position to refute what you say, but maybe we are dealing here with something that may be more difficult to deal with than the facts you just lay out, but a perception that maybe people have that there will be attempts to cover up or not to lay all the facts on the table, that maybe sometimes we have to bend over backward to see that perceptions are not reality.

That is a problem for us in Congress as we deal with politics and policymaking generally, you know, just bend over a little bit backward to see that perceptions are not reality in people's minds.

Dr. CLINTON. Senator, that is what we have been trying to do these last 4 years. I can understand how much effort is indeed needed to turn around the perceptions of the past, when I think there is no question that there were lengthy delays, there were some cases that were not investigated that warranted it, and this stays in people's minds a long time.

I think the record shows with every passing year that we are more vigorous in pursuing any incidents of suspected substandard care or unprofessional conduct, and I believe that people, including Senator Sasser, acknowledge that today.

So to some extent we need to talk about what are we doing today, what might be done further, as opposed to what did indeed occur 10 years ago, and shape today's policies by today's actions, not yesterday's policies.

Senator GRASSLEY. Then maybe it would be appropriate for me to followup with you at this time, or Mr. Garrett, if he does not defer to you, how many actions—and let us say just over the past few years, 5, 10 years, whatever you might want to pick—have you initiated to decredential or ultimately eliminately eliminate by separation marginal doctors?

Mr. GARRETT. I cannot answer that question. I would be happy to for the record.

Senator GRASSLEY. Yes, I think that is OK.

Mr. CLINTON. It is approximately——

Senator GRASSLEY. Could you give us what that process might be that would bring about decredential people? How does a case start? Is it a result of a claim or a complaint or maybe both? Do you need to answer that in writing or can you answer that right here?

Dr. CLINTON. I think I can describe the flow. As my colleagues indicated, these cases arise in a variety of ways and so they can come to us either as a letter to us saying that the services have not done what they thought was expected, sometimes the case comes directly to us. In all cases, we look at all of the evidence that has been gathered to date to assess the facts and evidence and conclusions.

All services now are undergoing a much more vigorous review. The Navy refers to this as a JAG manual investigation. There is a similar process for the Army and for the Air Force under different labels, but basically they designate a medical officer under the authority of the hospital commander to talk to all the individuals, all the processes involved in that incident, to gather the facts and the evidence and present conclusions, including conclusions or evidence provided by specialists from inside the military, we have brought specialists from cross-service, we have brought specialists from the outside—these are done at all levels, so indeed—for example, in a noteworthy case in an Army medical center on the west coast, the hospital commander brought in the medical school and brought in other civilian consultants to look at a particular case in the process and contributed to it.

Now, when they do that thorough a job, it really comes to our attention because indeed the conclusions I think are seen by all people as fair and just. In the event that a single or multiple health care providers, physician or otherwise, are thought to be a part, that is they contributed negligently to that act, that goes before a group of people first in the Quality Assurance Committee and then something called the Credentialing Committee, and recommendations are made.

The recommendations for corrective action would vary, of course, with the circumstances. It may be corrective training is necessary, it means that that procedure can only be done under the supervision of a trained senior physician, or indeed it may end up in his being totally decredentialed and therefore administrative processes begin to cause him to leave the service.

Now, the latter case, of course, is the rare exception and over the last 2½ years there have been something less than 100 of these that have occurred. These then are reported to the Federation of State Medical Boards so that the States know when we discharge a service physician in a decredential status, in the event any State wants to employ him or provide him a license.

So we have made it a turnaround, not only to investigate his case, take the actions, if we decide to discharge that individual, then we tell our civilian colleagues in the outside world so that they too know of those events.

Furthermore, whenever we take a permanent decredential action—let us say hypothetically that an individual is determined by his peers at the hospital level and the command level that he can no longer do that procedure, a permanent decredentialing procedure, that too is reported to the Federation of State Medical Boards so in the event he decides to leave 1 year, 2 years, 5 years hence, that too is on the public record.

So we have a process that involves specialists within the service, sometimes other services, oftentimes civilians in increasing numbers, that assesses the facts, makes a judgment, takes it to peer review so that physicians look at what is being said, what is being done, what actions are being proposed, a hospital commander and his higher command take those actions, which range from supervision to indeed ultimate discharge.

Does that summarize——

Senator GRASSLEY. Yes. You do notify the State boards of examiners of the medical profession?

Dr. CLINTON. Since 1981 we have advised the Federation of any physician who was discharged in a decredential status, yes. Now we are also advising them when any permanent administrative action, such as a court martial, which may or may not relate to medical issues, or any permanent decredentialing act limiting his practice in some specific segment.

Senator GRASSLEY. I have two questions. One I am going to ask you, and then I can read the rest into the record. I have to go vote. The other one I am going to have my staff ask, so I do not hold you people any longer. I want to hear from you, Mr. Willmore.

You said if we did pass one of these two bills, that this might encourage the Court maybe to further tear away and break down the Feres doctrine. I would like to know what you mean by that.

Mr. WILLMORE. OK.

Senator GRASSLEY. We will ask the other question and then I imagine we will have a 5- or 10-minute recess here because it takes me that long to go over and vote.

Mr. WILLMORE. Yes, in fact we believe that passage of this legislation would be a signal to many courts to continue their intrusion upon the Feres doctrine.

There are a number of decisions that are quite recent in this area. The Eleventh Circuit Court of Appeals, for example, recently decided a case by the name of *Johnson* which we believe to be a very significant intrusion into the Feres doctrine. We agree with the dissenting opinion in *Johnson* that the decision is inconsistent with well-established Supreme Court precedent, and accordingly we have asked the Supreme Court to review that case, and our petition is now pending before the Supreme Court.

There are other cases in other circuits that present problems. But the key principle is that *Feres* has always been seen as an absolute bar, because the Supreme Court has always recognized *Feres* as an absolute bar.

If the Congress through such legislation suggests that for certain kinds of negligence it is appropriate to waive the Feres doctrine, then the obvious question that the courts will then have to deal with—and will deal with—is whether the same policies that underlie waiving the Feres doctrine for medical malpractice also justify

waiving the Feres doctrine for other kinds of negligence. And, as you know, the Feres doctrine is a construction of the judicial branch. It is not an express statutory provision, but an interpretation of the Federal Tort Claims Act. By that, I mean it is not a statutory provision, but an interpretation of the statute.

So courts can go back and reinterpret that statute using this legislation if it were to be enacted as a guidepost for perhaps waiving the Feres doctrine for other kinds of negligence. Accordingly, I think the jeep case is a very troubling case. The courts might go back and conclude that that kind of negligence could also justify a waiver of the Feres doctrine.

There are other kinds of negligence such as activities that do not involve clearly professional day-to-day conduct, such as injuries at PX's or commissaries or on-base housing, or at recreational facilities, where the courts would immediately be asked to apply the same policies underlying this legislation to those kinds of injuries as well. And I think that what you would be doing potentially is opening the door to a major attack upon *Feres* and to years of litigation as litigants try to chip away, and I am afraid in some cases successfully—at the Feres doctrine.

Mr. GERDANO. So you would disagree with the characterization of the bills as being narrowly focused remedies, just focusing on military medical malpractice, they are bigger than that, is that what you are saying?

Mr. WILLMORE. I do not think there is any question of that. The bills are going to be a signal, no matter what legislative history accompanies them, and no matter how narrowly they are constructed in their legislative language. The bills are going to be a signal that the Congress of the United States has doubts about the application of the Feres doctrine to certain acts of negligence, and those same doubts will lead the courts to look at other kinds of negligence, and ask themselves whether Congress is suggesting that for these kinds of acts the Feres doctrine also should be waived. And I do not think there is any question that the courts will undertake that kind of an analysis.

I cannot predict any more than anybody can exactly how the courts will decide those cases, but there are some courts which are very hostile toward the Feres doctrine, and I do not think there is any question that they would use this opportunity as a way to significantly undermine the Feres doctrine in other areas.

Mr. GERDANO. Thank you. Just one final question to Mr. Garrett. We are going to be exploring alternatives to a tort remedy and we are interested in inquiring whether the department would support any kind of beefed up or enhanced compensation benefits to active-duty military who might be victims of clearly definable medical negligence.

Mr. GARRETT. That is a difficult question. Speaking for the department, we feel, as I said, that the mechanism that is in place today is adequate. If the question is whether or not our people are fairly compensated for injuries resulting from medical malpractice as well as other negligent injuries or injuries resulting from negligence, then we should look at that compensation schedule and determine collectively whether or not it should be increased.

Mr. GERDANO. One of our other witnesses suggests amending the Military Claims Act to allow claims of this nature to be cognizable and payable. How about that as an alternative, if it can be shown that the compensation presently afforded these victims is inadequate?

Mr. GARRETT. Well, I still think that we would prefer that the system as it exists remain. Even if you create an alternate administrative procedure, such as changing the Claims Act in some way, you are still separating out a special class of claimants based upon injury and the situs of injury, as opposed to the injury itself, and for that reason I think we would prefer not to support that, as opposed to remaining with the system as it exists.

Mr. GERDANO. OK. Thank you very much.

Mr. GARRETT. Thank you.

[Short recess.]

Senator GRASSLEY. The subcommittee will come to order.

I thank our next panel for being at the table. This panel consists of Michael F. Noone, Jr., a law professor and he is also associate dean of the Columbus School of Law, Catholic University, is a former judge advocate in the Air Force and is also experienced in litigation under the Federal Tort Claims Act.

Then we have Mark Dombroff, an attorney in private practice with the Washington firm of Hughes, Hubbard & Reed. Formerly he spent 15 years as a tort litigator for the Justice Department. He is also a former director of the torts branch.

I welcome both of you and we will start with you, Professor Noone.

PANEL CONSISTING OF MICHAEL F. NOONE, JR., ASSOCIATE DEAN, COLUMBUS SCHOOL OF LAW, CATHOLIC UNIVERSITY OF AMERICA; AND MARK A. DOMBROFF, HUGHES, HUBBARD & REED

Mr. NOONE. Thank you, Mr. Chairman. It is a pleasure to be here today. I have prepared a statement and I have asked that it be included in the record.

Senator GRASSLEY. Yes, thank you very much.

Mr. NOONE. In summary, my statement points out, sir, that it is remarkable that the Department of Justice never talks about the *Brooks* case. Since 1946, when the Federal Tort Claims Act was passed, the Department of Justice has refused to acknowledge that members of the armed forces on active duty have a right to claim under the Federal Tort Claims Act.

Ultimately, 3 years after the Tort Claims Act was passed, the Supreme Court ruled that, they did. A year later, Justice went back to the Supreme Court with another case, three cases that we now know today as Feres, and the Department of Justice said active duty service members do not have claims if those claims are incident to service.

The problem that we in the tort claims business have faced for the last 36 years is what "does incident to the service" mean. We are pretty certain that it does not mean what the Justice Department insists it means in every case where a member of the Armed Forces or their dependent brings suit. The Department of Justice

always asserts Feres, never acknowledges that *Brooks* permits servicemen and the dependents of servicemen to assert their tort claim.

I think that it is this rigidity on the part of the Department of Justice and some of the unjust decisions that have flowed from this rigidity which has caused your committee, the House committee, and the Armed Services Committee to be called back again and again to look at these tragic and heart-rending cases of members of the Armed Forces who have been treated carelessly in the system and who cannot receive compensation. That is why I am here today, sir.

I think it is important also to note, sir, that the *Feres* decision is really a decision involving judicial selfrestraint. The Supreme Court said:

> We ruled a year previously in *Brooks* v. *United States* that servicemen and their dependents did have a right to sue for injuries; in Feres we are ruling again, or interpreting our prior ruling, that we will not intervene in the internal affairs of the military,

and they offered certain reasons and those reasons have been reiterated to you over and over again—alternate method of compensation, fairness under the Federal system, interference with discipline and so forth. But that was an exercise of judicial selfrestraint.

And for the Department of Justice and for the Department of Defense spokesmen to turn that argument on its head and say that the legislature should restrain itself is entirely inappropriate, I think. The Constitution gave you the power to regulate and govern the Armed Forces, and I think that you are doing exactly what, as a member of the Armed Forces, I would hope you would do, which is look into a difficult and complicated problem and try to find a solution which will benefit all of us.

Now, unfortunately, I do not think that the bills that are before you really solve the problem. As I point out in my prepared comments, I think the cost figures are extremely fuzzy and I leave those to other panelists.

I question the premises on which the bills are based. First of all, it is very doubtful that allowing suit for medical malpractice will decrease the incidence of medical malpractice.

In 1927, Congress passed the Small Torts Claims Act because Congress was confronted with so many private relief bills involving government drivers in automobile accidents. I see no evidence of the fact that the waiver of sovereign immunity with regard to government automobile accidents has improved driving habits of government drivers at all. I simply do not believe that waiver of sovereign immunity will improve quality of health care.

Over time, I have also grown concerned to hear civilian authorities in the Department of Justice and in the Department of Defense talk about the impact on discipline of the Feres doctrine. I spent 20 years in the Armed Forces and I have no idea really what the impact on discipline is, but I think I am a little bit closer to it than some Justice Department attorney who never served in the Armed Forces and never commanded anyone. And I would think that if I were a legislator, and we were seriously, going to think about the impact of the Feres Doctrine on discipline, I would like to call some commanders and ask them what they think—not hos-

pital commanders—real commanders, commanders who train troops in the field to fight, which is what it is all about. As far as I know, no commanders have ever been called and asked their opinion on the impact of discipline. What you usually hear are Justice Department attorneys who have never been in the Armed Forces citing——

Senator GRASSLEY. Well, are you suggesting that you might hear then from those people that maybe it would not have a negative impact upon discipline?

Mr. NOONE. It is entirely possible. I simply do not know because nobody has ever asked them, any more than the Supreme Court asked.

The third premise that I question in the legislation is whether or not malpractice claims are actually different. When we talk about malpractice claims, we have a tendency to think about the slipped knife, the bad diagnosis, and that is the classic example. There are other classes of malpractice claims: bad equipment, the hospital does not have the proper equipment to do the job. That may be a policy level decision in which you are challenging military judgments. The hospital may have the right equipment but may be using a marginally qualified doctor. That may be a policy level decision.

Those classes of malpractice claims do get involved with military judgments. Then, sir, in my testimony I list a number of technical questions which I raised with regard to the bill. I will only touch on one or two of them.

I cannot understand personally why medical care overseas is excluded. Based on unclassified numbers, I have discovered that 640,000 members of the Armed Forces are stationed overseas. Many of them are serviced by major medical facilities of comparable quality to Walter Reed or Bethesda. I do not know why the House legislation excludes those people from coverage if coverage is warranted.

I also am a bit concerned as a retiree about the language of the legislation which applies only to active duty personnel. I have seen Feres applied in retiree cases. I have seen Feres applied to cadets at the Air Force Academy. I have heard of Feres being applied to reservists doing active duty training. That level of technical questioning I can leave to you and your staff, sir, but I think there are some basic problems with the bill.

In summary, as was mentioned while you were out of the room, I do propose an alternative scheme if you think it appropriate. If you think that legislation is warranted, another way of handling this problem would be to amend the Military Claims Act, 10 U.S.C. 2733, which is an administrative claims system adjudicated by members of the Armed Forces, not by civilian judges who might be afraid of interfering with military decisionmaking, in which——

Senator GRASSLEY. Do you have something to submit in regard to that?

Mr. NOONE. Yes, sir, and I have submitted it, it is a part of my——

Senator GRASSLEY. We have got it. OK.

Mr. NOONE. And that is a possible alternative if you think an alternative is appropriate.

That concludes my remarks, sir, and I thank you again for the opportunity to be here.

[The prepared statement of Mr. Noone follows:]

PREPARED STATEMENT OF MICHAEL F. NOONE, JR.[1]

REGARDING S. 489 and H.R. 3174 (99th Cong. 1st Sess.)

> To amend chapter 171 of Title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care provided during peacetime.

Mr. Chairman, Members of the Committee

Thank you for giving me the opportunity to appear before you. First, I will describe the Feres doctrine,[2] pointing out the Department of Justice's biased and exaggerated reliance on it -- thus sharing the position espoused by supporters of remedial legislation -- but also emphasizing the need for some sort of exemption to the Federal Tort Claims Act which precludes the judiciary from second guessing military decisions (even those made recklessly or willfully) in the context of a tort suit -- thus sharing the position taken by the Administration. Second, I will offer you my comments on the Bills before you, which I believe to be legally unsatisfactory. In conclusion, I will offer an alternative solution to the problem which has plagued claimants, lawyers, and the courts, ever since the Feres decision was announced.

I.

The Feres Doctrine

In his prepared testimony before the House Committee[3] Mr. Cox, the General Counsel of the Department of Defense, made an important point -- often overlooked -- that Feres was intended as a corollary of United States v. Brooks,[4] decided by the Court a year earlier, which had held, contrary to the position taken by the Department of Justice, that members of the Armed forces were not, solely by virtue of their status, precluded from suing the United States for injuries -- even for injuries caused by the negligence of other members of the Armed

Forces acting within the scope of their duties. The plaintiffs in Brooks were an injured serviceman, the administrator of his brother's estate (the brother was also on active duty at the time of the accident), and the boys' father, who was severely injured when they were struck by a U.S. Army truck, driven by a civilian driver. The driver's civilian status did not appear to have any effect on the Court's decision. The Brooks decision has never been over-ruled, and was expressly distinguished in Feres.[5] That fact warrants emphasis: many persons believe (and both the House Report, and the Department of Justice[6] encourage the belief) that Feres bars Tort claims by members of the Armed Forces. That is not the case; the claims are barred only if the injuries sustained were "incident to service." It is the term "incident to service" which has exercised subordinate courts and legal commentators over the years, as the Supreme Court proffered criteria and rationales which were wholly unusable.[7] "Incident to service" as it is presently used is criterion intended to preclude suits which would "requre [a] civilian court to second guess military decisions . . . and impair essential military discipline."[8]

Persons outside the military, even those willing to respect the Supreme Court's belief that judges are ill-suited to evaluate military decisions, might well ask why the typical medical malpractice claim -- exemplified with heart rending detail in the testimony before the House[9] -- could have any effect on military discipline.[10] In some cases, well publicized in the media, the malpractice was due to superior officers' failure to ensure that the physician was qualified to undertake the negligently performed procedure. This is, in itself, grounds for a hospital's malpractice liability.[11] The superior officers may have been motivated by a base desire to display their management skills by achieving quotas without the requisite qualified staff, or they may have made a considered -- but incorrect -- professional judgment that the

physician was qualified, or the decision may have been the result of sheer inattention. This legislation is intended to permit judicial review of those decisions and intrusion into that privileged sanctuary of professional military judgment which the Supreme Court has, by exercising judicial restraint, left to military authorities. Mr. Willard's statement before the House Committee[12] skillfully traces the outline of that sanctuary and the reasons which the courts have offered for its existence. His statement, unlike that of Mr. Cox, makes no reference to the Brooks decision, and by doing it gives the erroneous impression that the Supreme Court has consistently ruled that members of the Armed Forces could not, under any circumstances, assert a successful tort claim. More important, I think, is his failure -- and that of Mr. Cox -- to distinguish between the judiciary's exercise of self-restraint and the legislative power, found in Article I, section 8 of the Constitution, to make Rules for the Government and Regulation of the land and naval Forces. Over sixty years ago, the Supreme Court recognized that this power extended to steps taken to safeguard the health and welfare of the armed forces[13] and in this context the Chief Justice's statement in United States v. Shearer,[14] in which all the participating Justices joined, is particularly germane to your hearings:

> Special Assistant . . . Holtzoff . . . counseled Congress [with regard to the proposed Tort Claims Act] to "take it step by step" . . . We hold that Congress has not undertaken to allow a serviceman or his representative [to assert a Feres type claim]

Certainly the House Committee's findings that:

> "there is no reason why [such suits] should result in any breakdown of military discipline. In fact this legislation should result in improved military medical care, because of the threat of suit"[15]

suggest an exercise of that power.[16] Therefore, it is with a firm sense of the need of Congressional -- as opposed to judicial -- action in this area, that I appear before you.

There is, I think, a general consensus, outside the Department of Justice, that the government's assertion of the Feres defense on every occasion when it is tenable, has led to injustices and a perception that the Department is more interested in winning than it is ensuring fair treatment. Perhaps the clearest example of this attitude can be found in Watt v. United States[17] in which a retired soldier, (who had been in that status for eleven years) was injured in a military hospital when a portable telephone stand fell on his foot. The Department of Justice asserted the Feres defense!

I applaud Congressional oversight of the Justice Department efforts -- too often successful -- to persuade Courts and Agencies that Feres always applies to suits involving members of the Armed Forces. In the following section, I will discuss the two Bills before you.

II.

The Legislation

- Cost. The Congressional Budget Office's 1985 estimate, as to H.R. 3174, of $25,000,000 additional is based on the assumption that the government paid $50,000,000 in settlements;[18] no year is given. Compare that sum with Mr. Willard's testimony before the House,[19] that the Federal government had, "in the last fiscal year" (1984 ?) paid out $429,000,000 in Tort judgements. And then consider a report[20] prepared in 1984 for the Administrative Conference of the United States (ACUS) in which the author stated that GAO, for fiscal 1983, reported administrative tort settlements of $32,416,118 and litigation settlement and judgments totalling $104,423,334, for a total of more than $136 million.[21] The discrepancy between the sources requires explanation.

  The CBO estimate also assumes that exposure to liability is a function of the number of admissions. Clearly that is erroneous: In a study done by the National

Association of Insurance Commissioners (NAIC) for the period July 1975-December 1978, the most frequently reported procedures giving rise to malpractice claims would have involved outpatient visits to military hospitals, not admissions.[22] The CBO also assumes that exposure to liability remains constant among the various population groups (active duty, dependents, and retirees) served. That certainly is not the case. I am not an epidemiologist, but one thing is certain: obstetrics and gynecology is a particularly "high risk" specialty. As the number of women in the Armed Forces has increased, so has the possibility of OB-GYN claims, like that of Mrs. Denise Chaffee Soltys,[23] hitherto barred by Feres. In summary, if you believe that cost is important, I recommend that you insist on a much more thorough analysis than that prepared by the CBO. In this regard the spokesman for the Department of Defense, Mr. Cox, failed to supply any figures at all, although the Department of the Air Force -- whose malpractice experience, and whose patient population may or may not be representative -- has in place a claims data management program[24] and the analytic capabilities to make cost estimates.

My comments on the content of the Bills follow:

- Premises of the Legislation: I assume that the sponsors of the Senate Bill share the premises of the House Report and I question these premises.

-- Is there any reason to believe that military medical care will be improved by passage of the legislation?[25] I can see no logical reason why the House Committee's assertion should be true. You may recall that the final impetus for passage of the Small [Tort] Claims Act after World War I was the large number of private relief bills, most generated by auto accidents, pending before Congress.[26] There is no

evidence that government drivers became more careful when their employer waived its sovereign immunity, even in the days when tort claims settlements were made from annual agency appropriations.[27] Nor is there any reason to believe that drivers and their supervisors became more careless when Tort Claims payments began to made from a Permanent Indefinite Appropriation.[28] If military health care professionals were subjected to personal liability, the careless among them might become more careful, and health care improved, but Congress has decreed their immunity[29] for reasons I find persuasive, if not compelling.

-- If there is no reason to believe that military discipline will "break down"[30] because of the legislation's passage, is there any evidence at all of what its passage might do the vertical relationship, which we term "discipline," and to the group relationship which military sociologists call "cohesion"? I was surprised that the only members of the uniformed services to testify before the House Committee were the victims of medical malpractice, (which was the case as well when your committee held hearings on this topic four years ago)[25] and that civilian lawyers are routinely designated by the Executive to speak about the effect on discipline, which they do by citing the judicial opinions of other lawyers, few of whom ever had any military command responsibilities. I don't know what a senior military spokesman would say if asked for a personal opinion of the Feres doctrine, but commanders are far more familiar with the complex calculus of morale and respect for authority, than any of the witnesses who have spoken on this topic. Until the commanders are

heard from, I don't think Congress can assess the impact of this legislation on the disciplinary system. In this regard, the thesis of the author of the paper published in the House Hearings that military hospitals are removed from the mainstream of military life or activity,[31] was contradicted by the military testimony in the trial hearing of the Goldman[32] case in which a general officer explained why a clinical psychologist's deviations, in a hospital setting, from the military's dress code, had an effect on morale and discipline.

-- there is an unarticulated third premise as well: that the military victims of medical malpractice merit rights which other military victims do not. It can't be because malpractice injuries are more severe. The NAIC statistics[33] establish that most civilian malpractice settlements are relatively small, i.e., under $50,000. It may be based on the assumption that the lost opportunity to recover a large settlement, i.e., one exceeding half a million dollars, is more common in malpractice cases. I'm not certain that is the case. I'm reminded of the case of a soldier, the lower half of whose body was crushed by a carelessly driven (or at least his allegation was that it was driven carelessly) army tank. He was totally and permanently disabled. In an imaginative effort to avoid the Feres doctrine, his lawyer sued in the Claims Court, and failed.[34] That soldier and others like him, are as deserving of your consideration tnan those persons whose tragic conditions were described in the House hearings. To treat them differently is to treat them unjustly. Of course, implicit in this discussion is our shared assumption that the compensation for the dependents and victims of

injuries incurred "incident to service" is inadequate, at least in those cases where the injury was due to the fault of another member of the armed forces.

Why should the family of a Coast Guard pilot, whose death was caused by the carelessness of a Federal Aviation Agency employee, be allowed to supplement his government benefits by recovering from the United States under the Federal Tort Claims Act because the Feres doctrine doesn't apply,[35] while -- if he had been harmed by the carelessness of a member of the armed forces -- they could not recover? That is the puzzle posed the Feres doctrine, and it is not answered by singling out the victims of medical malpractice, or their survivors, for special treatment. I will in fact, offer a solution to the puzzle in section III but, before doing so, will raise some other questions regarding the Bills that have been proposed.

-- Would the discretionary function exception[36] still apply? Presumably it would, and if the malpractice could be traced to a policy level decision,[37] the victim would remain uncompensated.

-- I assume that the intentional tort exemption[38] would apply as well and, for example, the claim of military victim of a health professional's sexual assault would still be barred.[39] Less clear is the drafters' intent to include Tarasoff[40] situations: S. 489, p. 2, line 11 refers to "therapists." Under either Bill, would the failure to warn a potential (military) victim fall within the amendment? This is not as far fetched as you might think. United States v. Shearer[41] raised analogous issues.

-- Is "medical and dental care" in H.R. 3174, p. 2, line 8 synonomous with "treatment?" I assume that it is. The language in section 2681(a) in S. 489 leads me to conclude that under that Bill there need be no treatment in order to establish liability e.g., a

health professional might carelessly leave a clinic stairwell unlighted and the Feres Doctrine would not apply to a service member who slipped and fell.

-- I assume that both bills require the negligence to take place within the facility: if the physician were on call at home and failed to respond to an emergency, or responded to the call by telling the victim to "take a couple of aspirin and come in to sick call tomorrow," the Feres Doctrine would presumably apply. Both kinds of behavior have been held, under particular circumstances, constitute to malpractice.

-- Does S. 489 assume that the "foreign country exemption"[42] to the Federal Tort Claims Act would apply? H.R. 3174 is careful to limit its application to medical facilities in the United States, but no reason is offered. Why should the large overseas military hospitals be excluded? Why should all afloat facilities be excluded? The House Report states[43] that they relied on a Department of Defense definition, which effectively excludes approximately twenty-five percent of the active forces.[44] Were 640,000 members of our Armed Forces excluded because no one could devise a better definition?

-- The persons protected by the Bills differ: the House Bill limits its application to members of the active duty force and members of the National Guard performing federal service. Why are retirees not covered? Are cadets at the service academies? Reservists performing inactive duty training? What is the rationale for excluding those classes of persons to whom the Feres doctrine has been, or could be, applied? The Senate Bill's reference to "members of the Armed Forces" raises similar questions.

In summary, both Bills contain both substantive and technical flaws which need correction -- if correction is possible -- before they are passed into law. Moreover, if the testimony of the Executive branch witnesses is indicative of the Administration's views, I think that proposed legislation of this nature will face a presidential veto.[45]

However, the military victims of injuries incurred "incident to service" need not go uncompensated. The solution to their situation lies not within the Federal Tort Claims Act, but within another statute over which this Committee exercises jurisdiction.

III.

A POSSIBLE SOLUTION

When the Federal Tort Claims Act was passed, as section 4 of the Legislative Reorganization Act of 1946,[46] a number of claims statutes were already in effect. An uncodified section of the Act gives an incomplete listing of statutes that had hitherto authorized the settlement of claims which were based on "the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment . . . in respect of claims cognizable under the [the Act],[47] and directed their repeal. Otherwise, the older statutes were to remain in effect.

The term "cognizable" could mean that any "in scope" act or omission of an officer or employee, which might result in a tort suit against the United States must be adjudicated under the provisions of the Act, <u>even though one of the exemptions barred the claim</u>.[48] Such claims, in agency parlance, would be "cognizable but not payable." Prof. Bermann, the author of the ACUS report[49] offers an alternative reading of the term cognizable:

> On the other hand, a cognizable claim might be understood more narrowly as a Tort Claim arising out of acts within the scope of office that also does not fall within any

> of the FTCA exemptions. In fact commentators commonly describe an exempt Tort Claim as simply not cognizable under the Act. The language of the FTCA's repealer clause -- terminating agency settlement authority over torts committed by a federal employee acting within the scope of his office "in respect of claims cognizable under [the FTCA]" -- strongly implies that there indeed are some such Tort Claims not cognizable under the Act, presumably the exempted ones.
>
> All, in all, one should probably not attempt to decide the issue in terms of plain meaning, because there simply is none. Congress enacted the FTCA chiefly to broaden the government's accountability in Tort, but not necessarily to force its response into a single standardized mold. . . . Leaving pre-FTCA settlement authority intact would preserve the liberalizing purposes of those earlier statutes, without in the least ignoring the FTCA's own exemptions.[50]

The Supreme Court to created the Feres exemption to preclude litigation, not the administrative settlement of claims.

This Committee, and Congress, could conclude that "incident to service" claims should be administratively settled by the Armed Forces under claims statutes other than the Federal Tort Claims Act. If your Committee were to take that position, the "slippery slope" argument advanced by the Departments of Justice and Defense -- that judges should not be called upon to adjudicate issues involving morale and discipline -- disappears since adjudication would be the responsibility of the individual services. In fact, the military departments often pay claims which are "cognizable but not payable" under the FTCA by relying on other statutes. Although this fact is recognized by Professor Bermann,[51] he does not apparently realize how common the practice is. Literally thousands of sonic boom claims for property damage were adjudicated and paid by the Air Force, relying on the Military Claims Act,[52] even though the "discretionary function" of the Tort Claims Act exemption[53] was available to defeat the claims. If the claimant, who had no control over which statute was used to administratively settle the claim, was dissatisfied with the

adjudication, then suit would be initiated under the FTCA. Even after the Supreme Court ruled, in Laird v. Nelms,[54] that the discretionary function exemption applied to sonic boom claims, the United States continued to administratively pay them under the Military Claims Act, to the extent that they were found to meritorious. Although the Military Claims Act, as presently written, would bar "incident to service claims,"[55] it would be relatively simple to amend it to permit the adjudication of personal injury and death claims of persons presently barred by the Feres doctrine.

I am certain that the Department of Justice would oppose any such legislation, as would the civilian leadership in the Department of Defense, but the sole grounds for their opposition would be on the basis of cost, not the effect on military discipline. While they might also object to the lack of any jurisprudential guidelines as to what is, or is not, "incident to service," there is a large body of analogous military law, relating to "service connected offenses"[56] which would be useful.

Sponsors of legislation before you might well object to my solution on the grounds that the military bureaucracy will continue to blindly apply Feres criteria "in the interest of discipline." Certainly claims authorities in government agencies have shown a tendency to refuse to administratively pay tort claims if an exemtion were available.[57] If the law were to require the senior military commander i.e., the person exercising general court-martial convening authority (not a lawyer) of the unit with claims disapproval authority, to make a written determination and finding that payment of the claim was not in the interest of unit discipline, the problem of bureaucratic interia would be ameliorated. This requirement would, in view of the military's insistence on staff coordination, ensure also that the condition or behavior which caused the Feres incident, and its consequences, is brought to

the attention of a senior commander and his staff.

Proponents of the proposed legislation before you may raise two other objections: that the awards would be less generous than those awarded under the Federal Tort Claims Act, and that military victims would not have the benefit of legal counsel. With regard to the size of awards: there is no statutory limitation on payments under the Military Claims Act,[58] nor is there a practical limitation of fund availability since awards in excess of $100,000 are transmitted to the GAO for payment from the Permanent Indefinite Appropriation. It may well be that administrative awards will be less generous than those made by juries in civilian law suits. Generosity does not necessarily equate with fairness and, through your oversight responsibilities, you will be able to monitor the services' awards under the statute. With regard to assistance of counsel: Attorney's fees are not regulated by the Military Claims Act.

In summary, the goal of the proponents of this legislation, just compensation for the meritorious claims of members of the armed forces injured in accidents or incidents which would otherwise be barred by the Feres doctrine, could be achieved by amending the Military Claims Act, a far simpler and less expensive solution, and one which would apply to all members of the armed forces, afloat and ashore, in the United States and overseas, and not just to victims of medical malpractice.

FOOTNOTES

1. Biography attached.

2. Feres v. United States, 340 U.S. 135 (1950) (barring claims for personal injury or death if sustained "incident to services"); See also, Preferred Ins. Co. v. United States, 222

F.2d 942 (9th Cir.) cert. denied, 350 U.S. 837 (1955) (applying Feres to property claims).

3. Military Medical Malpractice, Hearings on H.R. 1161 Before the Subcomm. on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 99th Cong., 1st Sess. 313 (1985).

4. 337 U.S. 49 (1949).

5. Feres, note 2 supra, at 138. Brooks' continuing vitality was emphasized by the Supreme Court in United States v. Shearer, note 8 infra, 87 L.Ed2d 45.

6. House Comm. on the Judiciary, Report to Accompany H.R. 3174, amending chapter 171 of Title 28, United States Code, to permit active duty members of the armed forces to assert claims against the United States for injuries caused by improper medical care. H.R. Rep. 99-288, 99th Cong. 1st Sess. (1985); Hearings, note 3 supra, at 300.

7. See e.g., Jacoby, the Feres Doctrine, 26 Hastings L.J. 1281, 1284-85 n. 24 (1973); L.S. Jayson, Handling Federal Tort Claims, § 150 et. seq.

8. United States v. Shearer, 453 U.S. 47, 87 L.Ed.2d. 38, 44 (1985).

9. Hearings, note 3, passim.

10. Shearer, note 9 supra, at 44.

11. Darling v. Charleston Community Memorial Hospital, 50 Ill. App.2d 253, 200 N.E.2d 149 (1964); cert. denied, 383 U.S. 46 (1965).

12. Hearings, note 3 supra, at 257.

13. McKinley v. United States, 249 U.S. 397 (1919).

14. 453 U.S. 57, 70 (1981); see also, The Feres Doctrine As It Relates To Private Claims: Hearing Before the Subcomm. on Agency Administration Of The Senate Comm. on The Judiciary, 97th Cong. 2d. Sess. 70, (1982), (statement of W.H. Taft IV, General Counsel, DOD, acknowledging Congress' authority to waive the doctrine in whole or in part).

15. House Report, note 6 supra, at 4.

16. Whether, within the Congress, that power to regulate is to be shared by cognate committees responsible for the Armed Services, I leave to you.

17. 246 F. Supp. 286 (E.D. N.Y. 1965). See also Hale v. United States, 452 F.2d 668 (6th Cir. 1971) (Hitchhiking serviceman hit by a car while entering an army vehicle held subject to military orders; Feres applied). Collections of such cases illustrating the effects on family members are found in, Note, Effect of the Feres Doctrine on Tort Actions Against the United States by Family Members of Servicemen, 50 Fordham L. Rev. 1241 (1982); Note, If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin, 1983 U. Ill. L. Rev. 317.

18. House Report note 6 supra, at 6.

19. Hearings, note 3 supra, at 283.

20. Bermann, Administrative Handling of Monetary Claims: Tort Claims at the Agency Level, 1984 ACUS 639.

21. Id. 727, note 326.

22. National Assn. of Insurance Commissioners, Medical Malpractice Claims Study, Executive Summary 2 (n.d., Brookfield Wisc.).

23. Hearings, note 3 supra, at 195.

24. CAMP, described in the Bermann Report, note 20 supra, at 854.

25. House Report, note 6 supra, at 6.

26. 42 Stat. 1066 (1922), codified at 31 U.S.C. § 3723 (1983). The Automobile claim estimate is drawn from H. Rep. No. 342, 67th Cong. 1st Sess. 1-2 (1921).

27. Legislative Reorganization Act of 1946, Title 4, § 403(c), Pub. L. No. 79-601, 60 Stat. 812 (1946).

28. Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306 (1966); the provisions are now found at 28 U.S.C. § 2672 (Supp. 1985); 31 U.S. § 1304(a) (1985).

29. 10 U.S.C. § 1089 (1983) I am not aware of any efforts to correlate accident/incident rates before and after statutory grants of immunity such as that found in 28 U.S.C. § 2679(b) (1985) (drivers of motor vehicles).

30. House Report, note 6 supra, at 6.

31. Hearings, note 3 supra, at 134. (Student paper prepared by T.O. Hoover).

32. Goldman v. Secretary of Defense, 530 F. Supp. 12 (D.D.C. 1982), rev'd 734 F.2d 531, reh'g denied, 739 F.2d 657 (D.C. Cir. 1984), aff'd ____ U.S. ____, 54 L.W. 4298 (March 25, 1986).

33. Note 22 supra.

34. Jackson v. United States 213 Ct. Cl. 354, 573 F.2d 1189 (1978).

35. Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985).

36. 28 U.S.C. (§ 2680(a)).

37. Dalehite v. United States, 346 U.S. 15 (1953).

38. 28 U.S.C. § 2680(h).

39. Blevins v. United States, 769 F.2d 175 (4th Cir. 1985).

40. Tarasoff v. Regents of California, 17 Cal.3d. 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychiatrist owes duty of care to potential victim of his patient).

41. Note 8, supra, See also Payton v. United States, 679 F.2d 475 (5th Cir. 1982) (Release of a Psychotic Prisoner).

42. 28 U.S.C. § 2680(k).

43. House Report, note 6 supra, at 2.

44. International Institute for Strategic Studies, The Military Balance, 1985-86, 6, 13 (1985).

45. For an example of Department of Justice intrasigence under a "liberal" administration, see the presidential message accompanying the veto of the Private Relief Bill on behalf of Issac Hulver, 17 Weekly Compilation of Presidential Documents 2486 (Dec. 29, 1980).

46. Note 27 supra.

47. Id. § 424(a).

48. This ambiguity is discussed in Note, The Federal Tort Claims Act, 56 Yale L.J. 534, 549-551 (1947).

49. Note 20 supra.

50. Id. at 702-703. I must emphasize that Professor Bermann's proposals are limited to pre-existing statutes. The Military Claims Act, Act of July 3, 1943, 57 Stat. 372 (1943) was completely revised in 1966. Act of August 10, 1956, 70 A Stat. 153 (1956), 10 U.S.C. § 2733.

51. Note 20 supra at 701.

52. Note 50 supra.

53. Note 36 supra.

54. 406 U.S. 797 (1982).

55. 10 U.S.C. § 2733(b)(3).

56. Relating to court martial offenses over non service connected offenses, O'Callahan v. Parker, 395 U.S. 258, 274 (1968). See also Relford v. Commandant, 401 U.S. 355 (1971).

57. Bermann, note 20 supra at 848 ff.

58. 10 U.S.C. § 2733(d) (1986).

BIOGRAPHICAL INFORMATION

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Judge Advocate, United States Air Force, 1957-77. Claims Officer: Mitchel Air Force Base, New York (1957-79); Ben Guerir Air Base, Morocco (1959-60); Bolling Air Force Base, Washington, D.C. (1960-63). Member, Claims Division, Office of the Judge Advocate General (1963-67). Student, and Distinguished Graduate, Air Command and Staff College (1967-68). Director of Civil Law, Headquarters, Third Air Force, and Head of the U.K. Foreign Claims Commission, South Russlip Air Station, England (1968-72). Assistant Chief (1972) and Chief (1973-75), Congressional Legislation Division, Office of the Secretary of the Air Force. Director of Civil Law, Strategic Air Command, Omaha, Neb. (1975-77), retiring as a colonel.

- Recipient, Federal Bar Association's "Outstanding Young Federal Lawyers Award" (for work done on Federal Medical Care Recovery Act claims).

- Past Chair, Tort Claims Section of the Federal Bar Association.

- B.S. in F.S. 1955, Georgetown University's School of Foreign Service. Ll.b., 1957, Ll.M., 1962, Georgetown University Law School. S.J.D., 1965, The National Law Center of George Washington University.

- Doctoral Disseration, "Legal Problems of Non-Appropriated Funds", originally published as Appendix 1 of the Hearings on S.3163 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., p. 201 (1968), reprinted, Bicentennial Issue, Military Law Review (1975).

- other articles have appeared in the Aerospace Historian, Air University Review, American Bar Journal, Air Force JAG Law Review, have been reprinted, and annotated in American Law Reports (Federal).

Admitted to Practice before the courts of California, The District of Columbia and various Federal courts. Member, various bar associations, and the Inter University Seminar on Armed Forces and Society.

Senator GRASSLEY. Thank you.

Now we will go to Mr. Dombroff. Before you go, you know, you mentioned, Professor Noone, that would talk about the *Brooks* case. I did not go through my opening statement, but in it I do speak of it: "Shortly after passage of the act, courts faced the issue of the service member's right to sue. In 1949, the Court held in the case of *United States* v. *Brooks* that the plain language of the act did not exclude claims by service members." I then went on to tell about how, in *Brooks*, the two brothers, were involved in an off base accident, and were allowed to recover even though they were active-duty military.

By the way, I am just going to submit this for the record. I will make that announcement now, instead of giving it.

Would you go ahead, Mr. Dombroff?

Mr. DOMBROFF. Thank you, Senator.

Let me note at the outset, Senator, that I am acutely aware and appreciate the positions that were set forth today by the Department of Justice and the Department of Defense representatives. For 15 years, as you pointed out, I was with the Department of Justice, I defended those very positions and in fact I participated in a number of the cases that the opposition to the concept embodied in this bill relies upon.

I should also note that I am an ardent supporter of the tort reform initiatives that Mr. Willmore spoke about in some detail. I believe, as does the administration, that at a minimum we have seen a great deal of unpredictable behavior in the past several years from the courts. At a maximum I think we have seen certain instances where the courts have been out of control.

It is against that backdrop that I come before you to offer my comments today. The last several years in particular, I think we have seen a greater calling to accountability for all providers of goods and services, whether they are the Federal Government or they are private enterprise. It runs the gamut from the manufacturer of a refrigerator or playground equipment to the provider of health care services.

I do not believe that anybody can or should dispute the basic concept of accountability or the basic concept that one who has caused an injury to another should be liable for the consequences of that act.

However, I think what we have also seen during the last several years in respect to this concept of accountability is that, just as society, the concept of accountability has to undergo some evolutionary changes. For this very reason, I think tort reform as a general matter is mandated, and I think for this reason as well the conceptual type of change that is embodied in this piece of legislation does not do violence to either the basic concept of the Federal Tort Claims Act or the basic concept of the Feres doctrine as enunciated in the *Feres* v. *United States* case.

I cannot help but note that, as Professor Noone pointed out and as you also pointed out, that the Feres exception to the Federal Tort Claims Act was not enacted by Congress, and in fact I remember many times during the last 15 years, until May 1 of last year, where we at justice used the phrase in our motions to dismiss that

Feres is the only judicially enacted exclusion to the Federal Tort Claims Act. It is not a creature of Congress.

I would say that in today's society that the Federal Government serves basically two functions. I think we can classify those down into these functions and services which are uniquely governmental and those which are essentially identical to services or goods provided by private enterprise.

Even the Armed Forces performs functions in both areas. An example of uniquely governmental functions served by the military is perhaps the design, manufacture, procurement and operation of military weapons systems. I do not believe that either the Federal Government or segments of society which support the Federal Government in such activities should be subject to the threat of litigation.

The Feres doctrine in Government contractor defenses should properly insulate the Federal Government and military contractors respectively in such circumstances from suits by active-duty servicemen. On the other hand, I think what we are talking about today is something that falls within that wide range of activities that are undertaken by the Federal Government which are not in any way uniquely governmental, and for which non-government entities engaged in such activities find themselves litigatively accountable. Certainly the provision of medical care in a non-combat situation is one such area.

It occurred to me while I was listening to Professor Noone comment regarding the different kinds of medical malpractice and the question of insufficient equipment, specifically the question of medical malpractice or negligence committed overseas, that the Federal Tort Claims Act has within it, 28 U.S.C., section 2680, a number of exceptions.

One of those exceptions was most recently addressed by the Supreme Court in an aviation case specifically the discretionary function exception. Insofar as any lawsuit might relate to the question of whether or not the Federal Government made a decision not to have certain equipment for budgetary or policy reasons, that would be an protected decision.

So even if certain legislation were passed which would permit a medical malpractice action by an active-duty servicemen, it could not be brought based upon the fact that there was insufficient equipment.

There is also a foreign tort exception, and the United States is not liable for torts committed overseas. The rationale of Congress, when it passed that exception was that since the act makes the United States accountable by the law of the place where the act or omission occurred, the Congress did not want the United States as an institution, as a defendant, to be judged liable or not liable by the standards of a foreign country. Furthermore all of the often exceptions to the Federal Tort Claims Act would presumably be equally applicable to any legislation dealing with medical malpractice.

I should also note that whatever the Congress may do in this area, I would suggest that it would also be tempered by whatever subsequent action the Congress may take vis-a-vis tort reform in general. So to the extent there may be a cap placed on noneconom-

ic damages in general, to the extent joint and several liability may be eliminated, to the extent that contingent fees may be changed by any sort of Federal legislation, whatever the Congress did in this area of medical malpractice or non-uniquely governmental activities would be affected as well.

Assuming Congress makes the policy judgment that societal developments have evolved to the point that change is desirable, I really do fail to see where permitting a soldier stationed across the river at the Pentagon who goes to Walter Reed or Bethesda Naval Hospital on a Saturday morning in a non-combat situation, is, except in the most pedantic sense, threatening military discipline. I just have a very hard time conceiving that.

I am the first to confess that in my 15 years at Justice, the Feres-type situations in which I was involved clearly involved uniquely governmental activities, the military flying of aircraft. Furthermore there is no question but that if one is to accept the basic Feres rationale that it is certainly legitimate in that sort of situation.

But assuming the United States is given financial credit for the statutory payments which it may make under any sort of other legislative scheme, I do not really see a threat to military order being posed in the non-military non-uniquely Government situation.

I would be remiss if I did not acknowledge that there will undoubtedly be an increase in litigation. There will undoubtedly be an increase in payments from the U.S. Treasury.

The position that I always took while I was at Justice is that it is the U.S. taxpayer paying judgments. We are the U.S. taxpayers. The serviceman is the U.S. taxpayer. So I am not sure how much weight that argument has when I look at it from the other side of the line.

I suggest, however, that these are factors to be weighed and considered by the Congress, along with the policy factors and the factual matters that brought about the introduction of this legislation in the first place. I do not think, however, that either of these factors are in themselves reason to defeat this legislation.

Mr. Willmore mentioned the decision of *Johnson* v. *United States*. If I might just take one moment before I finish and mention it to you, I think it is of some interest.

It was recently decided by the Eleventh Circuit Court of Appeals, interestingly enough, in an en banc hearing—the en banc decision was requested by the Justice Department—The case arose out of a helicopter accident in which the plaintiff's decedent, a member of the U.S. Coast Guard, was dispatched to search for a civiiian boat. He was killed as a result of the negligence of civilian air traffic controllers.

The controllers were employed by the Federal Aviation Administration and were talking to the airplane and providing air traffic control direction to it at the time it crashed. Now, the en banc court held that the claims presented are based solely upon the conduct of civilian employees of the FAA who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot of the U.S. Coast Guard is not sufficient standing alone to activate the Feres conclusion.

Now, as Mr. Willmore pointed out, that decision is presently before the Supreme Court on a petition for certiorari. Frankly, the fear I have, is that unless the Congress does something in the *Feres* area in an orderly, intelligent way, we will see the chipping away that the courts have started to undertake already, and we will really see a threat to military discipline.

Certainly, the tort season in *Johnson* was a civilian agency, the Federal Aviation Administration, and I think that someone can come back and respond and say we, however, are talking about in the context of this discussion the military. However, frankly, I have a hard time categorizing medical malpractice as military or nonmilitary. Negligence is negligence, and the Federal Government in areas where there are not uniquely governmental activities involved like the provision of medical care in noncombat situations should be held to the same standards of accountability as the rest of society.

I would suggest this can be accomplished without disturbing the balance which must be struck, and I should say that I believe in the *Feres* rationale and I think the balance has to be struck between the all-important considerations of national security and the accountability which our Government institutions, including the military, have to be called before us to account for.

I do not, in conclusion, believe in any way that the standard of medical care will be improved by the passage of this kind of legislation. For 15 years, I watched air traffic controllers have their activities questioned, I saw the U.S. Government held accountable for their acts and their omissions, and I cannot come before you and say that there was a single instance where an air traffic controller or any other Government employee whose actions I was defending acted better or worse because they knew the Government was going to be liable.

I think that professions certainly are diligent, they look after themselves, they have pride in their profession, and I would suggest that the steps that are being taken and which I previously heard testified to fall into another area. They are admirable and I think that they achieve a different purpose.

I would be pleased to answer any questions you may have, Senator.

[The prepared statement of Mr. Dombroff follows:]

PREPARED STATEMENT OF MARK. A. DOMBROFF

Mr. Chairman and Members of the Subcommittee, I am Mark Dombroff and since May 1, 1985, I have been with the Washington, D.C. office of the New York law firm of Hughes Hubbard & Reed. For almost fifteen years prior to that I was with the Civil Division of the United States Department of Justice specializing in tort litigation. For the five years preceding my entry into the private practice of law, I was a Director of the Torts Branch. Since leaving the Department of Justice, I have continued to specialize in tort litigation.

I am pleased to be here today to present my views on S. 489, a bill, "To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care provided during peacetime."

Let me note at the outset that I am acutely aware of and appreciate the positions being put forth by the opponents of this legislation, specifically the Departments of Justice and Defense. For fifteen years I defended those very positions and, in fact, participated in a number of the cases upon which that opposition now relies. I should also note that I am an ardent supporter of the Administration's tort reform initiatives. I believe, as does the Administration, that those reforms are mandated by a system which has proven in recent years to be, at a minimum, unpredictable, and at a maximum, out of control. It is against this backdrop that I come before you today to offer my comments on S. 489.

The last several years have seen a greater calling to accountability for all providers of goods and services in our society. This has run the gamut from the manufacturer of products to the provider of health care services. Certainly no one can or should dispute the necessity for such accountability or the basic concept that one who causes another injury should be liable for the consequences of his act.

Some forty years ago, in enacting the Federal Tort Claims Act, 28 U.S.C. § 1346(b) et seq., the Congress recognized the concept of accountability as being applicable to the federal government. However, Congress also felt that the federal government and federal officials must be free to exercise certain uniquely governmental prerogatives without threat of litigation. It acknowledged this by imposing a number of restrictions on the right to sue the federal government. See e.g. 28 U.S.C. § 2680. However, the concept of accountability, just as society, must undergo evolutionary changes in order to remain in-step with the society it must serve. For this reason, tort reform is mandated. For this reason as well, the conceptual change embodied by S. 489 does not, in my opinion, do violence to either the basic concepts of the Federal Tort Claim Act or the Feres doctrine as enunciated by the Supreme Court in Feres v. United States, 340 U.S. 135 (1950).

The federal government serves many functions and is active in a great many areas of everyday life in today's society. Basically, these activities fall into two broad classifications, --those which are uniquely governmental in nature and those which are essentially identical to functions or services performed by private enterprises. Even the armed forces of the United States engages in both types of activities. An example of a uniquely governmental function served by the military is the design, manufacture, procurement and operation of military weapons systems, i.e. aircraft, ordnance. Certainly neither the federal government nor those segments of society such as the manufacturers relied upon and used by the federal government to carry out such activities should be subject to the threat of litigation from active duty servicemen. The Feres doctrine and government contractor defenses should properly insulate the federal government and military contractors, respectively, in such circumstances.

On the other hand, there is a wide range of activities undertaken by the federal government which are not in any way

uniquely governmental and for which non-government entities engaged in such activities find themselves litigatively accountable. The provision of medical care in non-combat situations is one such area.

Assuming Congress makes the policy judgment that societal developments have evolved to the point that change is desirable, I fail to see where permitting a soldier stationed at the Pentagon who is injured due to the malpractice of an army doctor in a non-combat situation is, except in the most pedantic way, posing a threat to military discipline. Assuming the United States is given financial credit for any statutory payments which it might make to that soldier, I do not see any real threat posed to military order. I might note that H.R. 3174, the House version of this bill, does provide for a reduction of claims by other benefits.

I would be remiss if I didn't acknowledge that, in all likelihood, the passage of this legislation, no matter its final form, will probably result in some increase in medical malpractice litigation and will undoubtedly result in some greater payments by the Treasury to those injured. However, I suggest that these are factors to be weighed and considered by the Congress along with the policy factors and factual events bringing about the introduction of this legislation in the first place. I don't think that either of these factors--increased litigation or increased payments--are themselves reasons to defeat this legislation.

Our present tort crisis is one which, quite separate and apart from the military medical malpractice question, must be addressed. This legislation, S. 489, if enacted will certainly be the beneficiary of any tort reform which may subsequently become law. S. 489 should rise or fall on its own merit or lack thereof.

There has been at least one recent decision by the United States Court of Appeals for the Eleventh Circuit which has

a direct bearing on the question of the relationship between military discipline and governmental negligence. I believe the Committee will find it interesting.

Johnson v. United States, 779 F.2d 1492 (11th Cir., 1986), arose out of a helicopter accident in which the plaintiff's decedent, a member of the United States Coast Guard, dispatched to search for a civilian boat, was killed as the result of the negligence of civilian air traffic controllers. These controllers were employed by the Federal Aviation Administration and had assumed air traffic control jurisdiction over the helicopter when it encountered adverse weather.

The United States filed a motion to dismiss the action in the District Court asserting that the Coast Guardsman's death was incident to military service and thus suit was precluded by virtue of Feres v. United States, supra. The District Court agreed and dismissed the action. The Court of Appeals however, reversed, 749 F.2d 1530 (11th Cir. 1985), and at the suggestion of the Government, an en banc review was granted. 760 F.2d 244 (11th Cir. 1985).

On January 13, 1986, the Eleventh Circuit, sitting en banc, reinstated the panel decision reported at 749 F.2d 1530 (11th Cir. 1985).

In reaching its result, the Eleventh Circuit relied heavily upon the recent case of Shearer v. United States, ____ U.S. ____, 105 S. Ct. 3039, 87 L.Ed.38 (1985), involving the off-base death of one off-duty serviceman by another off-duty serviceman. Suit was brought against the United States alleging that the United States was negligent in failing to control one of the servicemen or warn others about him.

Finding that the suit was barred by the Feres doctrine, the Court determined that Pvt. Shearer's allegations relative to the acts and omissions of his superiors and their failure to "remove Andrew Heard from active duty" went directly to the "management" of the military and called into question "basic

choices about the discipline, supervision, and control of the serviceman."

Writing for the majority in Shearer, the Chief Justice noted:

> "[t]he Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases."
>
> 105 S. Ct. at 3043-44.

After a lengthy discussion of Shearer, an en banc Eleventh Circuit in Johnson, stated:

> "Following this command, we find the panel opinion has given proper consideration to the Feres factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts involving the military structure or military decisions. The claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation) who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the Feres preclusion."
>
> 779 F.2d at 1494.

It is clear from the Johnson case, whose last chapter has yet to be written, that at least one federal appeals court has focused upon an issue similar to that embodied in S. 489, namely the ability of a serviceman to sue the United States for negligence where the activity at issue does not impact upon military discipline. While the tortfeasor in Johnson was a civilian federal agency, the Federal Aviation Administration, it is somewhat nonsensical to categorize medical malpractice as military or non-military. Negligence is negligence and the federal government, in areas which are not uniquely governmental, like the provision of medical care, should be held to the same standards of accountability as the rest of society.

Before concluding I cannot help but recall the comments of one of the strongest and most effective proponents of tort reform in our country today, Richard Willard, the Assistant Attorney General of the Department of Justice's Civil Division. I recently heard an interview with Richard dealing with tort

reform. One of his comments in particular struck me. He said, when asked the purpose of the legislation being supported by the Administration, that it was to restore a "sense of balance into our justice system." I would suggest to the Committee that a carefully drafted amendment to the Federal Tort Claims Act in the area addressed by this legislation will do no less. Furthermore, I believe this can be accomplished without disturbing the balance which must exist between the all-important considerations of national security and the accountability which we as a society must insist upon for our governing institutions.

I would be pleased to answer any questions which the Chairman or any member of the Subcommittee may have.

Thank you.

Senator GRASSLEY. Let me start right where you left off, then, and get back to the point of accountability and ask you that, since in neither one of these bills the individual doctor is going to be personally liable, what is there then that is going to discipline them so that the hospitals and the doctors will be more accountable?

Mr. DOMBROFF. I do not think that either one of these bills will, nor do I think it is necessarily a good idea to build language or procedures into these bills which will do it. I do not think that financial accountability equates to improve professional skills.

I think in that respect the military is unique. The military has a hard time attracting doctors, it has a hard time holding doctors. I think in today's environment, with private physicians insurance rates being as high as they are, the individual threat being posed to private physicians such as it is, I think that military doctors do enjoy a certain amount of insulation from that problem.

I think the kinds of things which I heard testified to by the doctor earlier, the kinds of internal checks and balances, if they are aggressively pursued, I think that will do it.

I do not think that personal financial accountability is going to do it because, frankly, I think at the end of the day we will find out that there is truly a shortage of military doctors because the compensation is not such that a doctor is willing to take that risk while at the same time joining the military.

Senator GRASSLEY. Well, I accept your judgment on that, but I think that part of the theory behind the people that introduced it is that that is going to bring a certain amount of discipline and more professionalism than is presently there.

Mr. DOMBROFF. I think if the overall motivation of the people who introduced this bill is to bring a greater amount of accountability—and I am not talking of institutional accountability, but genuine personal accountability of doctors, I think that the bill will not accomplish that purpose.

I would go so far as to say that if they were to build language into this legislation that imposed personal financial sanctions, made these doctors individual defendants in these cases, in many respects the bill would be counterproductive.

I think, however, if what the sponsors of this bill and the people introducing it had in mind is a piece of legislation which would provide a greater degree of remedy to those injured, I agree with the concept. But in terms of the other side of the picture, I cannot subscribe to that.

Senator GRASSLEY. Then I would like to ask both of you about what the Supreme Court said in the *Feres* are, about it being irrational to leave servicemen's tort claims dependent upon geographic considerations over which they have little control, where they might be. In other words, they do not choose where they will be stationed.

The bills before us would amend the Tort Claims Act, to allow suit by servicemen, but since the act looks to be State law, is it not unfair to subject servicemen to widely fluctuating State laws?

Mr. DOMBROFF. I think certainly that is what the Act says and I think that, yes, there is a tradeoff. I am not sure the question is whether or not it is an unfair tradeoff. Medical malpractice traditionally outside the Government hospital looks toward community

standards. Now, in some respects we are looking more toward national standards.

I would suggest that the people who take issue with the application of a particular State law probably are more focusing upon the damages question and perhaps some of the procedural aspects than upon the standards of what is medical malpractice and what is not. To the extent that a serviceman who is the victim of malpractice is the victim of that because he was ordered 2 years before to go to a particular city, is being treated unfairly, I would suggest that, yes, you can characterize that, if you would, as unfairly. I am not sure that that is an appropriate term, but, yes, he will be subject to a particular law, absent enactment of a Federal standard, that he might not have chosen himself.

Senator GRASSLEY. Then let me have as a followup to that, let us take the case of where a State enacts laws limiting liability for pain and suffering. Would the bills be fair to the serviceman who happens to be malpracticed upon while he was in that State through no choice of his own?

Mr. DOMBROFF. If we are going to use the words "fair" or "unfair," the answer is he would not have the opportunity or the ability to seek damages for pain and suffering under the applicable law that he might have in the State to which he is going to return when his army tour is up. So I think that there clearly would be a difference in applicable law, yes.

Senator GRASSLEY. I am going to stop here and make a point that Senator Specter is asking some questions to be submitted in writing, so we will put them in the record at this point.

[The prepared questions of Senator Specter follow:]

QUESTIONS SUBMITTED BY SENATOR ARLEN SPECTER, JUNE 24, 1986 [1]

1. While the proposed bills provide for an exception to the *Feres* doctrine by allowing servicemen on active duty to sue for medical malpractice, they are unclear as to the rights of family members or non-military personnel, where malpractice occurs at a military facility. Could you please clarify the rights of these persons under S. 489 and H.R. 3174?

2. Under the Federal Tort Claims Act, family members or non-military personnel maltreated at a military facility cannot sue the United States when the malpractice occurs at a facility located in a foreign country. In light of the number of foreign bases with medical facilities and the large number of non-military personnel on these bases, it seems unrealistic that these classes of people are not provided for under the proposed legislation. What is your position regarding protection for non-military personnel maltreated in facilities in foreign countries?

3. What is the impact of S. 489 and H.R. 3174 on the Military Claims Act, which provides for a $25,000 ceiling on claims with no judicial review?

Senator GRASSLEY. Now, is not fairness though—I know it is difficult to define and differs among people, but that is the point of these bills.

Mr. DOMBROFF. I am sorry, I am not sure that I understand the question, Senator.

Senator GRASSLEY. The issue of fairness is the point of the bills.

Mr. DOMBROFF. I agree. As I understand it, the issue is fairness and I think what you are touching upon—and I agree with Professor Noone the bills themselves are flawed.

I think what you are pointing out and picking up on is the fact that in actual application there are going to be some very difficult

[1] Answers on page 138.

problems presented. There is no question about it. I am the first to acknowledge that. There will be some very difficult problems.

If on the one hand, the Congress were to say that we are going to make a major realignment in the Feres rationale, we will permit the government to be sued for all nonuniquely Governmental activities, and on the other hand they cannot be sued for any uniquely governmental activities, that is one very broad-brush approach.

I think that we will see, even if the Senate passes and the Congress enacts a more limited type approach such as medical malpractice, we will see evolution in the courts. I think that is what the courts are supposed to do, is to try to interpret what the Congress meant.

Yes, I think we will have claims of unfairness. We have the same claims in our court system now. The example I always hear is, one person sitting on the aisle on one side of the airplane and the other person sitting on the aisle on the other side of the airplane. They both are subjected to exactly the same negligence, the crash occurs, they are both killed, in one case the wife can recover for loss of consortium and the children can recover, and the other one can get nothing because of the particular laws of the State. There is a basic inequity and a basic unfairness.

I think what you are addressing is the larger question of tort reform.

Senator GRASSLEY. OK. But does not the bottom line of your discussion just kind of say something about the impractical nature of tort claims approach as a solution to the problem?

Mr. DOMBROFF. I think there are other solutions to the problem, and that is why I say yes, I think I basically agree with the observation you have just made. I think that what has got to be determined is what is the purpose of this piece of legislation or this approach to the problem. Is the purpose to improve the standard of medical care and the accountability of government medical facilities, or is the purpose to improve the compensation available to active-duty servicemen who are injured as a result of military medical malpractice.

If it is the former, the bill does not do that and no piece of legislation will do that. It simply will not work. I watched it for 15 years and I do not believe that any piece of legislation that the Congress could enact will improve the accountability of standards of professional medical care. The profession will have to do it itself.

If the purpose is to improve the lot in terms of financial recovery of the victims, the bill will do that, but the question that you have raised is are there better ways to do that, and I think there are better ways to do that.

Senator GRASSLEY. I want to refer to your point where you said negligence is negligence, and then refer you to what DOJ's concerns about passing legislation like this might encourage the courts to chip away and abrogate Feres, if you do not think that maybe their concerns are legitimate.

Mr. DOMBROFF. I think even Mr. Willmore acknowledged that one cannot sit here and prognosticate what the courts will or will not do.

Judging from the past few years, the courts have certainly taken a number of runs at Feres already. The eleventh circuit in the

Johnson case is the most recent one, and certainly one of the most troubling, because what it would do is it would open up a very wide door, not just a little chip, but it would open a door in this Feres equation.

Do I think that if the Congress were to pass legislation that was precisely and carefully drawn, that the courts would look for ways to get around the precise and careful drawing? The answer in my experience is many, many courts are result oriented and the results which they seek to achieve are results based upon the fact situations presented to them.

If a court has a particular fact situation that in his or her mind deserves to make an end run around Feres or whatever other precisely drawn legislation the Congress may put out there, the court is going to look for and find a way. So yes, I think there is a legitimate fear of that. I do not think the fear is necessarily greatly magnified in light of what the courts seem to be doing today anyway.

But certainly I think that the courts will see that the Congress has made adjustments and they will take that as an opportunity to make interpretations, and some of the interpretations may not be consistent with what the Congress intended.

Senator GRASSLEY. OK. Let me ask you if you would consider an alternative to these current pieces of legislation that we are considering and think as part of the background of my question the fact that such a high percentage of any recovery goes to legal fees and court costs, whether or not you would favor legislation that increased the overall amount of disability pension or VA benefits that would be paid to military members in cases where there was medical malpractice.

Mr. DOMBROFF. Let me first address just peripherally the first comment. Under the Federal Tort Claims Act, and I know that you, Senator, have before you now legislation that would address this question of attorneys fees which are limited if the matter goes into litigation to 25 percent of the recovery. If the matter is settled as a claim, the attorneys fees are limited to 20 percent. These are statutory limits, so the attorney going into that sort of situation knows exactly what limitations he is operating on and we are not talking about these 33⅓ and 40 percent types of situations, and perahaps even 50 percent types of situations that we have all heard about.

I do think that if the purpose of this legislation is to improve the lot of the serviceman who is injured by virtue of medical malpractice in a military hospital or a military institution and there is a genuine concern on the part of both the Department of Defense and the Department of Justice, and not just the blind insistence that Feres must prevail, about military discipline. I think that an alternative way to go is to improve the compensation schemes. Now, I do not suggest, and I am not that familiar with the economics of it that I would presume to suggest, that they should be improved to the point of what is available in a private malpractice action. I think that the private malpractice action versus the military malpractice action has certain parallels and has certain differences, namely that the plaintiff is in the military and there are certain things that are attached to that.

But I do think one way to go and perhaps the more desirable way is through changes to existing compensation schemes.

Senator GRASSLEY. I am going to have a couple more questions to submit in writing.

[The prepared questions of Senator Grassley follow:]

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United States Senate

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June 26, 1986

Prof. Michael F. Noone, Jr.
Associate Dean
Columbus School of Law
The Catholic University of America
Washington, DC 20064

Dear Prof. Noone:

In your June 24 testimony before my Subcommittee, you suggested that victims of military medical malpractice -- currently barred by the Feres Doctrine -- can be better compensated through amendments to the Military Claims Act ("Act").

1. Assuming a change in the current "incident to service" bar in the Act, would your proposal contemplate that the services would administratively adjudicate malpractice claims?

1a. Would such claims be paid without a hearing on negligence issues?

1b. How would the services decide the amount of a claims payment? I assume the calculation under the Act would be more complex than in the "sonic boom" cases you testified about.

2. The $100,000 ceiling for payment under the Act without reference to the Comptroller General (section 2733(d)) seems to be too low to accommodate awards for medical malpractice. Do you suggest that Congress raise this amount again?

2a. Do you see such an amendment creating other problems, e.g. the "fairness" of raising it only for malpractice cases?

3. As another alternative, is it feasible to establish a kind of "Medical Care Review Board" within DOD to administatively adjudicate (under the APA) allegations of malpractice? (such a board could feature civilian Presidential appointees with medical and legal training who could hear allegations of substandard care, pursuant to section 554 of the APA. The Board could then make recommendations to the service Secretary that (1) additional compensation be awarded, and/or that (2) disciplinary action be taken against particular doctors).

3a. Are there any civilian agency analogues (e.g. Benefits Review Board of the Department of Labor; Federal Mine Safety and Health Review Commission; Occupational Safety and Health Review Commission) that provide a useful framework for such a Board?

Thank you for your kind attention to this matter.

Sincerely,

CHARLES E. GRASSLEY
Chairman, Subcommittee on
Administrative Practice and Procedure

CEG/

Senator GRASSLEY. Before this panel goes, I would like to have you, if you could briefly, Professor Noone, explore with me your alternative under the Military Claims Act.

Mr. NOONE. Well, the alternative was offered, sir, in response to the obvious concerns that your committee and the Congress must have, that this is not a year to propose legislation to expand tort liability and to extend the liability of the United States for financial payments, it is not a good year to be thinking about that sort of thing, and I think the administration witnesses made that clear.

So as I reflected on the task before you and the problem to be solved, I thought that perhaps an alternative way of arriving at the goal, if the goal is, as Mr. Dombroff points out, to compensate people who are the victims of medical malpractice, that an alternative way to reach that solution is through administrative claims which could be adjudicated within the armed forces under the provisions of 10 U.S.C. 2733. Awards would be made to meritorious claimants, including dependents.

The exemption provision to the Tort Claims Act would not apply, so that the discretionary function exception would not apply, the overseas exemption would not apply, and therefore people could get additional compensation. That was my suggestion to your committee, sir, in an effort to avoid ending up litigating difficult questions, because many of the Feres questions are tough to litigate.

Senator GRASSLEY. I am interested in exploring those alternatives, because I have come into this hearing with no preconceived notions, and I guess maybe the way to do that would be through my staff.

Mr. NOONE. Well, I can carry it one step further, sir. In making the suggestion in my prepared statement. I said that I was certain that the administration would oppose this as an alternative suggestion and that they would argue against it, and certainly they would argue against it based on cost. "You are going to be spending more money to compensate people and we do not know how much money," that is an argument.

But they lose the other argument; they lose the disciplinary argument because the claims would be adjudicated by uniformed members of the Armed Forces. In fact, I make the suggestion that if the claim is denied on the grounds that it would interfere with discipline, the claim should be signed off not by a hospital commander, not by a lawyer, but by the senior military commander of the unit.

If the commander agrees, the commander is also going to solve the problem. Part of your malpractice problem arose at hospitals where there were no military commanders. There are no commanders at Bethesda. There are no commanders at Walter Reed. They are a bunch of doctors who happen to be commanding medical units. If that happened at Fort Hood, TX, the commanding general would have those doctors removed the first time he heard a suggestion that they were harming his troops.

Senator GRASSLEY. That is creative.

Mr. NOONE. Thank you.

Senator GRASSLEY. I thank both of you very much. I think I will go on to the next panel, but I do have about four questions that

you will receive that I would appreciate an answer in writing in maybe 15 days.

Mr. DOMBROFF. Certainly.

Senator GRASSLEY. Thank you.

Mr. NOONE. Thank you.

Mr. DOMBROFF. Thank you, Senator.

Senator GRASSLEY. We have drawn our next and final panel from the medical field, Dr. Clark Watts, who is a medical professor at the University of Missouri, at Columbia, who will testify on behalf of the American Association of Neurological Surgeons, and Mr. Charles Ord will testify in his capacity as executive director of the Association of American Physicians and Surgeons, and Dr. Bedford Berrey, who will speak on behalf of the National Alliance of Senior Citizens, and he is the medical director for the Alliance.

I would thank you very much and ask you to proceed in the manner in which I introduced you.

Dr. Watts is first.

PANEL CONSISTING OF CLARK WATTS, M.D., PROFESSOR OF SURGERY, UNIVERSITY OF MISSOURI, COLUMBIA SCHOOL OF MEDICINE, ON BEHALF OF AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS; CHARLES R. ORD, EXECUTIVE DIRECTOR, ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS; AND BEDFORD H. BERREY, MEDICAL DIRECTOR, NATIONAL ALLIANCE OF SENIOR CITIZENS, INC.

Dr. WATTS. Thank you very much, Mr. Chairman. I appreciate this opportunity to make this statement to you. The full text has been submitted for the record and I will, because of time, only summarize.

My testimony is in opposition to S. 489 which will overturn the Feres opinion of the U.S. Supreme Court in the area of medical liability. For background, let me just identify myself.

I am professor of surgery and chief of the division of neurosurgery at the University of Missouri-Columbia School of Medicine. I teach medical students and direct an active neurosurgical training program, and maintain an active personal practice of neurosurgery.

I have been in the U.S. Army Reserve since 1963. In this capacity, I have been able to practice medicine and observe the practice of medicine in the military as a general medical officer and as a neurosurgeon.

Advocates of this legislation state it is needed in order to deter malpractice by physicians in the military against active duty personnel. Of course, we all know that physicians in the military are not sued, it is the Federal Government that is sued. I will not dwell further on this issue in my testimony as it has been adequately and eloquently spoken to by others.

The advocates of this legislation also say it is needed in order to remove the second class status of service members by providing a means of compensating them for injury caused by negligent medical care. Active duty personnel are currently compensated for any injury suffered in the course of their duty, not just that caused by the negligence of military health care providers. Thus, a means is

already in place to compensate active duty personnel for all injuries.

The result of this legislation will be to needlessly complicate the administration of medical care in the military and by so doing to increase cost without increasing benefits to the service member. It will produce an increased liability burden upon the Federal Government at a time when the civilian sector, reeling from the disastrous impact of a runaway liability system is desperately seeking remedies.

I know you are quite aware of the effect of this impact on all areas of our society and I will not burden you with a long list of anecdotes. Just witness the numerous tort reform bills currently before Congress and the various State legislatures.

But it is not just the economic issue of which I speak. It is one of pride and morale. The special pride of practicing medicine in the military comes from the recognition that while these extremely competent but beleaguered physicians serve the dependent sector, the reason for being in the military ultimately is to serve the active duty service member. I have heard no reason nor do I see one to infect, with the adversary system, the unique relationship which exists between the military physician and the active duty service member.

The pride I mentioned a moment ago underscores the desire we all have that our servicemen and women receive the best medical care possible. The proposed legislation will not contribute to that goal. That goal will be obtained by ensuring that the service member is served by competent and qualified physicians. This is gained by proper credentialing of physicians, establishing active quality assurance programs, and providing appropriate continuing education for the physician.

For many reasons, not the least of which is the scrutiny the military has received in the past few years of its medical manpower procurement policies, the credentialing process of military physicians has become tighter and more accurate. Ten years ago when I accepted a reappointment into the Army Reserve, my papers were processed in a matter of a few weeks. The credentialing process for a potential military reserve physician today takes many months. The same is true for any physician wishing to leave the civilian sector and enter active military service.

I have had an opportunity over the years and particularly recently to study first-hand the quality assurance program in the Army, both here and abroad. In comparing these programs at all levels, I found those in place in the military to be much tighter and more critically scrutinized than anything I have seen in civilian private practice or in academic institutions in the approximately 25 years I have been a practicing physician. The Army can be proud of the steps it has taken to monitor the medical care received by active duty personnel.

I do, however, have some concerns about the continuing education programs for physicians which exist in the military. I believe this area can and should be significantly strengthened. I recognize by directive money is currently allocated for continuing education of the physician. To a large extent, this money is disbursed at the discretion of commanders and others who control the professional

life of the military physician. Unfortunately, serious inequities exist.

For example, a young, well-trained Army surgeon, after completion of his training, was immediately stationed in Europe. It was 3 years before he was able to come back to the United States for a meaningful continuing education program. During that time his civilian counterpart was expected to have received at least 150 hours of continuing education.

During those 3 years, the military physician was practicing what he had learned, but the civilian physician was learning additionally from experts, new and more efficient ways of practicing, such as better ways to use the laser in surgery, for example, or to interpret noninvasive diagnostic studies such as magnetic resonance imaging, et cetera. Similar shortfalls have been reported to me by Air Force and Navy physicians.

Needed is definitive language which assures that all uniform physicians receive continuing education comparable to their civilian counterparts. But what of the person who has been injured as a result of the medical care he has received? Should he not be compensated additionally for these injuries?

I do not know the answer to that question, but systems of compensation are already in place in the military for active duty personnel. Disabilities, whether the result of injuries on duty or the result of medical care, are handled through the disability rating process.

Consideration may be given to factoring into this process administratively the costs of medical care related injuries, thus avoiding the added expense and disruption produced by the tort system.

In summary, this legislation against which I testify today is not needed, not desired, and will not benefit the armed services in general nor individual service members specifically.

In fact, the servicemen and women of our forces will suffer by the diversion of resources from the medical care system to support an expanded tort system. What is needed is a continued search for ways to improve the quality of care service members receive from military medicine and certainly the physician. Enormous positive strides in this direction have been made. However, continuing education of the military physician needs to be more definitively guaranteed.

And finally, if compensation for medical care related disabilities is desirable, the disability rating system under which the injured service member is currently compensated should be considered as the vehicle, rather than the decompensating tort system.

Thank you very much.

[The prepared statement of Dr. Watts follows:]

Prepared Statement of Clark Watts

Mr. Chairman and Members of the Subcommittee,

I am Doctor Clark Watts and I am pleased to be here today on behalf of the American Association of Neurological Surgeons and the Congress of Neurological Surgeons. My testimony is in opposition to Senate bill 489 which will overturn the Feres opinion of the U.S. Supreme Court in the area of medical liability. First, please let me identify myself. I am Professor of Surgery and Chief of the Division of Neurosurgery at the University of Missouri-Columbia School of Medicine. I teach medical students and direct an active neurosurgical training program. In addition, I maintain an active personal practice of neurosurgery.

I have been in the United States Army Reserve since 1963 except for the period 1969 to 1976. In this capacity I have been able to practice medicine and observe the practice of medicine in the military as a general medical officer and neurosurgeon. Especially in the last few years, I have had an opportunity to participate in and observe the delivery of neurosurgical care in the military to both dependents and active duty personnel.

Advocates of this legislation state it is needed in order to deter malpractice by physicians in the military against active duty personnel. Of course, we all know that physicians in the military are not sued; the federal government is sued. I will not dwell further on this issue in my testimony as it has been adequately and eloquently spoken to by others.

The advocates of this legislation also say it is needed in order to remove the "second class" status of servicemembers by providing a means of compensating them for injury caused by negligent medical care. Active duty personnel are currently compensated for any injury suffered in the course of their duty, not just that caused by the negligence of military health care providers. Thus, a means is already in place to compensate active duty personnel for all injuries. I will speak more to this later.

The result of this legislation will be to needlessly complicate the administration of medical care in the military and by so doing to increase cost without increasing benefits to the servicemember. It will produce an increased liability burden upon the federal government at a time when the civilian sector, reeling from the diasterous impact of a run away liability system, is desperately seeking remedies.

I know you are quite aware of the effect of this impact on all areas of our society and I will not burden you with a long list of anecdotes. Just allow me to

underscore this statement by noting that within the next year approximately 8 actively practicing neurosurgeons in one of the largest cities of our country may very well prematurely close their practices because of the liability problem.

But, it is not just an economic issue of which I speak, it is one of pride and morale. The special pride of practicing medicine in the military comes from the recognition that while these physicians serve the dependent sector, their reason for being in the military, ultimately, is to serve the active duty servicemember. I have heard no reason, nor do I see one, to infect, with the adversary system, the unique relationship which exists between the military physician and the active duty servicemember.

The pride I mentioned a moment ago underscores the desire we all have that our servicemen and women receive the best medical care possible. The proposed legislation will not contribute to that goal. That goal will be obtained by ensuring that the servicemember is served by competent and qualified physicians. This is gained by proper credentialling of physicians, establishing active quality assurance programs, and providing appropriate continuing education for the physician.

For many reasons, not the least of which is the scrutiny the military has received in the past few years of its medical manpower procurement policies, the credentialling process of military physicians has become tighter and more accurate. Ten years ago when I accepted reappointment into the Army Reserve, my papers were processed in a matter of a few weeks. The credentialling process for a potential military reserve physician today takes many months. The same is true for any physician wishing to leave the civilian sector and enter active military service.

I have had an opportunity over the years and particularly recently to study first hand the quality assurance program in the Army. I have recently visited a major Army medical center, an Army base hospital, and the practices of two separate Army division surgeons. In comparing the quality assurance programs at all levels, I found those in place in the military to be much tighter and more critically scrutinized than anything I have seen in civilian private practice or in academic institutions in the approximately 25 years I have been a practicing physician. The Army can be proud of the steps it has taken to monitor the medical care received by active duty personnel.

I do have, however, some concerns about the continuing education programs for physicians which exist in the military. I believe this area can and should be significantly strengthened. I recognize money is currently allocated for continuing

education of the physician. However, to a large extent this money is dispersed at the discretion of commanders and others who control the professional life of the military physician. As a result, serious inequities exist. Once again, I will not burden you with a long list of anecdotes. An example will suffice. A young, well trained, Army neurosurgeon, after completion of his training, was immediately stationed in Europe. It was three years before he was able to come back to the United States for a meaningful continuing education program. During that time his civilian counterpart was expected to have received at least 150 hours of continuing education. During those three years the military physician was practicing what he had learned, but the civilian physician was learning from experts new and more efficient ways of practicing such as better ways to use the laser in surgery, or to interpret non-invasive diagnostic studies such as magnetic resonance imaging. Similar short falls have been reported to me by Air Force and Navy physicians, including non-neurosurgeons. It seems, in the quest for education dollars, the military physician is significantly short changed, certainly to the detriment of military medicine.

But what of the person who has been injured as a result of the medical care he has received. Should he not be compensated for pain and suffering, so called noneconomic losses? I do not know the answer to that question, but it is useful to look at how this problem is being addressed in the civilian sector. Increasingly, legislative caps on awards for noneconomic losses are being considered, and implemented. Also, more attention is being paid to the establishment of programs and processes which will yield compensation outside the tort system through bargaining or negotiations.

These systems are already in place in the military for active duty personnel. Disabilities, whether the result of injuries on duty, or the result of medical care, are handled through the disability rating process. Consideration may be given to factoring into this process, administratively, the costs of medical care related injuries thus avoiding the added expense and disruption produced by the tort system.

In summary, this legislation against which I testify today is not needed, not desired, and will not benefit the armed services in general nor individual servicemembers specifically.

In fact, the servicemen and women of our forces will suffer by the diverson of resources from the medical care system to support an expanded tort system. What is needed is a continued search for ways to improve the quality of care servicemembers receive from military medicine and certainly the physician. Enormous positive strides

in this direction have been made. However, continuing education of the military physician needs to be more definitively guaranteed.

And finally, if compensation for medical care related disabilities is desirable, the disability rating system under which the injured servicemember is currently compensated should be considered as the vehicle, rather than the decompensating tort system.

Thank you for the opportunity of presenting these views to you this morning.

Senator GRASSLEY. Thank you, Dr. Watts.

Mr. Ord.

Mr. ORD. Mr. Chairman, my statement has been submitted for the record, so I am going to limit myself to just a few comments.

First I would indicate that AAPS supports the Feres doctrine. Second, I would comment that throughout the morning we have heard much about fairness. In response, I must observe that the tort system leaves much to be desired if fairness is our objective. In applying the laws of 50 States to claims of service personnel will assure inflated awards for some while others suffer from miserly treatment.

I recognize that special situations do occur where individuals suffer extraordinary injury which may not be fairly compensated under the current system I recommend that the subcommittee give consideration to establishing an appeals mechanism within the existing system. This appeals mechanism should include a procedure under which a member of the services who had experienced extraordinary injury is entitled to petition for a review of his/her case by an expert board.

The board, upon finding of exceptional injury, would be empowered to provide additional benefits to individuals and recommend disciplinary action in which the respective service would either concur or explain why an alternative action was selected.

Along this same line, I would observe that Congressman Moore and Congressman Gephardt have introduced legislation I believe in this Congress and also in the previous Congress where they would direct the civilian malpractice problem currently plaguing to a no-fault system.

While AAPS is not in agreement with the Moore-Gephardt approach as the appropriate solution to the national liability crisis, we think in the case of the military where one must give consideration to military discipline and the system of service injury related benefits now in place, that the Feres doctrine should be retained.

One other comment, in conclusion: If there is a demonstrated need to improve the quality of medical care in the armed services, this can best be achieved through education and training, through good management, and effective disciplinary programs. Introducing the tort concept would not improve military medical care.

I will take questions. Thank you.

[The prepared statement of Mr. Ord follows:]

Prepared Statement of Charles R. Ord

Mr. Chairman and members of the Subcommittee:

I am Charles R. Ord, Executive Director of the Association of American Physicians and Surgeons (AAPS). The Association is made up of physicians, from all regions of the country, who are devoted to the preservation and strengthening of the private practice of medicine. Our headquarters is Burke, Virginia.

The members of this Association have a very direct interest in all aspects of the quality of medical care and the procedures for dealing with issues of medical malpractice. Accordingly, we have closely followed legislative proposals to overrule the Feres Doctrine governing military medical malpractice matters. My purpose today is to share with you the Association's observations on these proposals and on the Feres Doctrine.

I will make three basic points.

One, we feel the Feres Doctrine is a reasonable, workable and fair approach to handling military medical malpractice issues.

Two, it is our opinion that new legislation permitting claims by service personnel against the United States would do nothing to improve the quality of medical care, but would create serious problems in the functioning of the military.

And, three, we feel that consideration should be given to providing an appeals mechansim within the existing system to assure that cases of extraordinary injury can be fully appraised and fairly compensated.

It is our opinion that the Feres Doctrine, in prohibiting suits by service personnel against the federal government and individual service men and women and federal employees for injuries incident to military activities, rests on three very sturdy policy legs.

The first is that the government already provides a comprehensive, no-fault procedure to compensate military personnel for injuries growing out of their military service, including injuries arising from improper or inadequate medical care.

Free medical care is provided for those on active duty. A comprehensive disability retirement system covers men and women permanently injured in the line of duty. And the Veterans Benefits Act provides medical care and disability and death benefits for service-disabled veterans and their families. (Those eligible for both disability programs must choose one or the other.)

In the words of the Supreme Court, these programs provide "a swift, efficient remedy for the injured serviceman..." A circuit court has made the same point in these words:

> "The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way."

The second policy leg is that the Feres Doctrine supports the need to maintain order and discipline in the armed forces if they are to function effectively.

Clearly, our military forces operate in a manner different from that of the civilian community. Loyalty, teamwork, discipline

and following orders up and down the chain of command are essential if the armed forces are to meet their responsibilities to the nation. By avoiding confrontations between indiviudals and between individuals and the government, and by barring adversarial proceedings, while at the same time providing fully for those who suffer injury, the Feres Doctrine contributes substantially to maintaining order in the military.

Third, in the policy perspective, the Feres Doctrine recognizes the federal relationship of the government and members of the armed forces.

As the Supreme Court has stated:

> "Without exception, the relationship of military personnel to the government has been governed exclusively by federal law. We do not think that Congress, in drafting this (Federal Tort Claims) Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence."

My second basic point is that legislation permitting claims against the government would do nothing to improve the quality of medical care but would create serious problems for the military.

Extending the tort system to the armed services would severly burden the services with the confusion and chaos that now overhang malpractice issues in the civil courts. Additionally, the tax dollars paid in defense costs, judgments and plaintiff's legal fees would have little or no effect upon doctors who are statutorially insulated from personal liability. Nobody knows better than America's physicians and surgeons how adversely the present system is affecting medical practice across the country.

The facts are that despite the steadily improving quality of medical care in the United States there has been a steady increase in the number of liability suits filed and the size of awards has climbed sharply. Some results of this situation are these:

* The cost of liability insurance for some medical specialties has climbed to more than $100,000 a year.

* Facing these spiraling costs, some physicians are giving up their practices.

* 'Defensive medicine' is on the rise. The cost is hard to pin down, but extra tests and procedures ordered to minimize the malpractice threat have been estimated to add anywhere from $15 billion to $40 billion to health care costs annually.

How this blizzard of litigation would affect the armed services is a sobering thought, indeed.

My third basic point is this: The physicians in this Association recognize that special situations do occur where individuals suffer extraordinary injury which may not be fairly compensated under normal procedures and programs.

To deal with this problem, we recommend that the Subcommittee give consideration to establishing an appeals mechanism within the existing system of handling injury issues in the services.

This mechanism would include a procedure under which a member of the services who had experienced extraordinary injury could

petition for review of this case by an expert board. The board, upon a finding of exceptional injury, would be empowered to provide additional benefits to individuals and to recommend disciplinary action in which the respective service would either concur or explain why an alternative action was selected.

In view of the issue before this Subcommittee, I think one additional comment is pertinent.

Today's liability crisis is such that a fairly strong case has been made for moving the country away from the tort concept toward the basic idea that underlies the military approach to handling medical injury issues -- that is, toward a system that does not assign blame or require time-consuming court litigation to settle claims.

A bill to do precisely this was introduced in the House last year by Henson Moore (R-LA) and Richard Gephardt (D-MO). In doing so, they pointed out that one of its major purposes was to encourage health care providers "to act in the best interest of the patient."

While AAPS does not support this approach in the civilian arena, we do recognize the ever increasing weaknesses and distortions of a tort system controlled and manipulated by insiders who are the true and ultimate beneficiaries of their fallacious actions.

My concluding observations are these:

If there is a demonstrated need to improve the quality of medical care in the armed services, this can best be achieved through education and training, good management and effective disciplinary programs. Introducing the tort concept and liability insurance coverage will not improve medical care.

Introducing the tort concept would wash out guaranteed benefits provided under the Feres Doctrine.

Introducing the tort concept would create a critical threat to the effective functioning of our armed forces.

Accordingly, the Association of American Physicians and Surgeons opposes legislation designed to extend the tort litigation approach to medical malpractice to the military.

Senator GRASSLEY. Thank you.

Dr. Berrey.

Dr. BERREY. Mr. Chairman, at the outset I would like to say that our organization, the National Alliance of Senior Citizens, conducted a poll of its membership in October with respect to H.R. 3174, and the results were overwhelmingly in favor of not tinkering with the Feres doctrine.

By way of background, sir, I spent 25-plus years on active duty as a medical officer in the U.S. Army, and with 5 years reserve time, retired in 1976 as a colonel. I have had a number of assignments, many of them in personnel actions. I was Chief of the Medical Corps Branch in the Surgeon Generals Office. I was Director of Personnel in the Office of the Assistant Secretary of Defense for Health. I was Deputy Chief Surgeon of the U.S. Army (Pacific). I was Assistant Army Attaché in India. Finally my last assignment was Health Director of the Canal Zone Government. I also was in the VA as Extended Care Deputy Assistant Chief Medical Director.

It is our opinion, sir, that this modifies and adds to our written testimony. These are thoughts that are in addition to that.

It is our opinion that S. 489 can only be considered as a symptomatic cure for a problem that it does not reach. Rather than destroy the Feres doctrine, I suggest that serious deliberation be focused on increasing compensation, and we have heard support for that already today, that compensation seems to be an approach where current compensation for alleged malpractice is considered insufficient.

Let me turn to some possible solutions, sir, which I think are critical and essential to the entire military medical establishment, including the Department of Defense.

We heard the Defense witness talk about quality of care, and this is certainly a subject of keen interest and concern to the laity as well as the medical profession.

However, I must submit that the term "quality of care" defines a clear, crisp and concise definition. It is what one believes it to be, where it happens and what the conditions are in that community which generally tend to govern what quality of care is, and it varies from place to place, from New York to California. It has to extend itself to the local community.

But quality assurance is another issue, and that really means to assure quality of care, but it does not say how it is to be accomplished. Unless I am badly mistaken, Mr. Chairman, retrospective case review generally relates to quality assurance.

Personally, I do not believe that retrospective reviews are sufficient in our present high-technology environment in medicine. To be effective instruments to reduce the incidence of medical malpractice, quality assurance and quality of care must be on-going and current. This is not to take exception to the DOD witnesses and their concern for quality of care and the programs that they have implemented. I submit those are policy suggestions and not commands, because they have a policy directive over the three services.

However, quality assurance and quality of care can be achieved only by daily and constant vigilance at all levels of medical command. An attainment of high quality of care requires, in my judg-

ment, a top-down philosophy openly expressed and exercised in a pervasive manner at every echelon of care. It must start at the highest levels of military medical command and be implemented by hospital commanders, directors of nursing, chiefs of service, staff medical officers, orderlies, secretaries and every individual who comes in contact with the patient and members of the family. Support staffs such as laboratory, pharmacy, x ray, dietician, et cetera, are all involved in providing care, and we cannot overlook the importance of housekeeping or medical records departments.

If all concerned with patient care are consciously aware that the hospital commander and his top management staff are personally and visibly—and I emphasize visibly—dedicated to the principle of providing the highest possible level of care to all who enter the facility, then it will be provided.

How can this be achieved? Very simply. Hospital top management and the hospital commander, obviously, appear on the wards, in the clinics, and the emergency rooms at odd times and at other places within the hospital unannounced, and may appear on weekends and holidays. As qualified professionals, they can immediately spot poor or marginal quality and take remedial action.

They should seek out relatives as well as patients and speak to the relatives in terms of what they think the care is. The ancient dictum "the commander is responsible for all his unit does or fails to do" is nowhere more appropriate than in the medical setting.

His very presence has untold positive effect on staff personnel, the patients and their families, and his active participation in patient care demonstrates his concern. This is leadership in a medical facility and positive changes will result.

It is rare but it does occur, when a hospital commander will actually take time to work in a clinic. I would cite the instance of Gen. Leonard Heaton, who was Surgeon General of the Army for 10 years, and then he operated on average once or twice a week at Walter Reed. He knew what was going on.

However, sir, today the pressing concerns over budget, visiting VIP's, a variety of command inspections of a military nature, IG visits, et cetera, all combine to deter to varying degrees the military hospital commander from his primary mission, which is to care for those who seek care in his hospital. It is paramount also that hospital commanders and their staffs have confidence that they will be supported at every level of medical command, including levels of medical command all the way to the Surgeon General and, more recently, the Department of Defense.

While there are exceptions, it has been my experience that the majority of complaints about patient care arise first of all in the clinics or in an out-patient department or an emergency room.

In my opinion, only the very best qualified and most caring and most thoughtful people should be assigned to that one area of the hospital where impressions are formed for good or ill. Such impressions become indelible, and a good impression goes a long way toward reducing complaints which could lead to worse.

A philosophy of caring, a positive concern for personal relationships, together with a visible spirit of humility, without evidence of hastiness or indifference will serve both the patient and the hospital staff.

Incompetent, careless or negligent physicians exist in the military the same as in civilian life, however probably in no greater percentage than lawyers, accountants, engineers, or other professionals. Unfortunately, physicians and allied health personnel command a much higher profile.

Vigilance over professional performance and a personal familiarity with the professional qualifications of each physician on the staff by the hospital commander will and should serve to identify problems early on. Swift personnel actions are required and are provided for.

The Surgeon General and the intermediate command level personnel and line commanders must support the position of a hospital commander when he is faced with an incompetent or marginal physician.

In conclusion, Mr. Chairman, I am confident that solutions exist to reduce the incidence of medical malpractice in the armed services without the bill before us, S. 489. I am of the opinion that such incidence is far less in military medicine, but as previously noted, carries a much higher profile, gains a higher degree of media attention, and also from the Members of Congress.

Effective reduction of the incidence remains a function of the degree of sensitivity to human needs exhibited by military medical and paramedical personnel toward their fellow servicemen and women and their dependents as well as to the retired community. As has been mentioned earlier, the physician will not pay for any award, it will be paid by the taxpayer, and I do not think we need further burdens on the taxpayer. We support the retention of the Feres doctrine as written and we would urge implementation of other measures.

Thank you, Mr. Chairman.

[The prepared statement of Dr. Bedford H. Berrey follows:]

Prepared Statement of Bedford H. Berrey

Mr. Chairman, Distinguished Members of the Committee, Ladies and Gentlemen: I am Bedford H. Berrey, M.D., and I am the Medical Director for the National Alliance of Senior Citizens, Inc. (NASC).

The issue of medical malpractice is one which is not far from the center of legislative action all over America today. Some legislatures have enacted severe limitations on the ability of plaintiffs and their attorneys to sue or to recover damages in medical malpractice lawsuits.

Product liability is another area of enormous concern in both the states and the federal government. Pending before another committee of the Senate is a far-reaching measure put forward by President Reagan to help bring rational thought to bear on the way our courts decide cases of product liability.

Thus the medical malpractice question within our nation's armed forces is joined with a wide range of similar concerns presently before the Senate and our nation's many legislative bodies.

The difference between S. 489 before you and the other measures advancing through the legislature is that they are designed to limit the liability reach of plaintiffs and attorneys. Many professionals who have never once been accused of malpractice find their practices threatened by insurance cancellation or premiums so high that they no longer feel they can continue to pursue their profession.

Further, the makers of many products are facing such challenges to their fiscal stability and economic underpinnings that they must soon choose whether to cease manufacturing and producing or to risk losing their entire enterprises to the ravages of court ordered payments for alleged defects - whether made with or without knowledge.

It is within that frame of reference that the House passed measure and the Senate bill pending before this subcommittee is viewed in part. With attorneys facing reversals at all levels of government, the appearance of this measure seems to be an effort on the part of attorneys to take the offensive. They find themselves in an atmosphere of extremely defensive posturing to protect their present ability to collect large fees from personal injury cases.

There is a national mood in opposition to the trial lawyers and their suits - certainly not toward the idea of fairness to those who have been harmed - but to the extent of the awards and the lucrative gains made by the attorneys in those cases.

The June 3, 1986 California primary election was accompanied with a vote on Proposition 51. This considered a laundry list of reforms designed to limit the ability of the trial lawyers and their clients to collect from those whose involvement in the tort was distant at best.

A veritable fortune was expended by the trial lawyers to protect their practices from these limits. This included a huge advertising budget to convince the voters that they were merely defending the innocent and the consumer.

Their arguments failed to be persuasive, and by an overwhelming margin, the electorate forced limits on the attorneys.

This mood, as expressed by California voters, is not limited to the people of our most populous state. It is shared nationwide as our citizens learn of the damage the liability situation is causing in their own lives.

Another major effect of the lawsuit mania in torts is the loss of many older doctors who are now retiring rather than continuing in practice due to the outrageous sums they must pay for medical malpractice insurance. Our organization has learned of many of these retirements from our members and from the physicians themselves.

The gravity of this lost talent and patient care potential cannot be easily measured. However, considering the fact that the highest levels of public confidence in the medical profession were found when these men and women entered practice and represented the purest motives of the medical field, it can be assumed that we are losing some of the best before their ability and desire to serve has ended.

This hearing, however, relates to the area of medical care where attorneys from the civilian sector have up to now been denied the opportunity to enter lawsuits and collect extreme sums for the alleged malpractice by the military medical profession for services provided to the armed forces of the United States.

The present law is based on a 1950 Supreme Court decision in the case Feres v. United States. This is now known as the "Feres Doctrine," and holds that a member of the armed services cannot sue the federal government, another member of the armed forces or a civilian government employee for injuries or damages resulting from activity in the line of military duty.

Because this doctrine has been upheld repeatedly in challenges before the Supreme Court, the only avenue remaining for those who wish to open up the armed forces and those associated with military duty to such lawsuits is through Congressional lawmaking.

No one would want a member of the armed services to be subjected to any wrong without having that wrong corrected or compensated. They are entitled to the same consideration due to any other American, and many considerations the rest of us do not merit because they are providing us the shield against all attacks against our freedom.

If the Feres Doctrine did not consider these vital facts, and the present remedies available for any such wrong were inadequate, then it would deserve a full and immediate replacement.

The facts are otherwise, however.

First, there is a comprehensive no fault compensation system in place for all active duty military personnel for claims arising from their health care treatment.

Second, the requirement for discipline within the armed forces mandates that servicemen not have the ability to enter civilian courts to press charges against one another - or to have servicemen testifying in civilian courts against one another or their superior officers.

Third, there is a worldwide mission for our armed forces which places them in widely different places at any given moment. They are subject to the Uniform Code of Military Justice wherever they are, making the present system of adjudicating torts within the military consistent wherever the soldier may be stationed, or under any other circumstances.

In order to assure that these objectives and compensations systems are achieved, Congress established an "extremely" generous system of compensation for those injured in the line of their military duty, whether the claim is filed during active duty or after.

The media have reported many instances - especially during the Vietnam War - of this system's overcompensating those nearing retirement with disability claims. There are only rare examples of denial of disability.

Under the Veterans Benefits Act, servicemen with claims, or their survivors, can receive substantial sums and benefits for genuine cases of wrongful or accidental service-related injury.

Active duty servicemen and their dependents receive full medical coverage in military health installations - and for cases where such medical treatment results in injury, unlimited sick leave pay with full pay and benefits and allowances until recovery or until active duty release is provided.

Should the release coincide with retirement or release from active duty, military hospitals and/or veterans hospitals provide continuing care for these individuals.

As part of the benefits paid to active duty service personnel and to retired military persons, full medical services are provided in military facilities on a space available basis. This is an important part of the benefits package for our armed services.

This assures that any line of duty injury will be completely covered in monetary cost to the injured individual.

This is part of the lifelong framework of armed service life. The servicemen of America join the armed forces to protect our nation, to defend freedom with their lives if necessary and to conduct the affairs of defense with the highest standards of professionalism at all times. Our payment of the health benefits for these persons in this full life situation is a small price for the benefits we derive from their sacrifice.

The military medicine system is expensive, but it works for those for whom it is intended and for the purposes for which it was created. Each of us who has served has seen first hand the medical care and attention extended to our fellow soldiers and ourselves. Since that care needs continuing improvement to assure first rate medicine, there must be a top priority commitment given by the Department of Defense to achieve this goal from the largest hospitals to the smallest field center.

The medical teams who care for military personnel are committed to their assigned duty - sometimes more so than those who oversee health care to earn their payments from patients in the private sector.

While surely there are errors made by military medical practitioners, there is full redress for the injured. Adding the spectre of the legal profession with the right to haul military personnel into civilian courts, or to recall military personnel from their stations around the world to meet a court date, and to cause military personnel to testify against one for matters of tort, is to create chaos where none is present. The justification for this drastic change simply does not exist.

Further, it must be pointed out that those who would be sued for the alleged malpractice are not going to pay a dime from their own money. Instead, the losers in such cases would be the taxpayers who would be the true respondents to any such lawsuits.

The availability of lawsuits against military physicians would, therefore, be no inducement to improve performance, not would it change medical practices - one of the reputed goals of this legislation.

Right now, private sector medicine is practiced to first defend against potential lawsuits - and then to help patients. Defensive medicine has no place in the Department of Defense!

Americans already spend between $15 and $40 billion a year on medical malpractice in insurance premiums, legal fees, unnecessary tests and procedures designed to avoid lawsuits. We don't need similar costs added to the pricetag for military medicine where it is clearly unnecessary.

One final thought that few people truly understand. The money to pay for the outrageous court awards and settlements come from premiums paid by consumers, not from insurance firms which are viewed as having limitless resources. Under this bill, the money to pay the awards would come from the taxes paid by all of us, not by "the government," the illusory shadow in Washington which is viewed as having limitless money!

Placing military medicine in similar straits to the problems now faced by civilian medicine would result in great losses to each of us.

It is unnecessary, ill advised and clearly a selfish interest piece of legislation to serve the very few who are already served by a working and proven system. Further, it would help to restore the offensive to the trial lawyers who are suffering reversals in other areas due to their own excesses and yes, greed.

They deserve no windfall reward like this one at the hands of our taxpayers, our service personnel and the military medical system. The Feres Doctrine is sound, time tested and must not be changed or discarded.

Thank you, Mr. Chairman, for providing us this opportunity to present our views on this measure. I would be pleased to respond to any questions from the Committee.

Senator GRASSLEY. I thank each of you. I am going to submit questions to you in writing. I am not going to make you sit through another vote that we will have. I do have some questions, and if you could return those in about 15 days, I would appreciate it.

I would like to only summarize in the sense of saying, as I have already indicated, that I have come into this with a fair mind, of listening to what the problems are and whether or not they need to be solved by legislation and, if so, what route to go, and I think our record gives us testimony on both sides of that issue.

We will not be hasty in reaching a judgment, and I feel that the subcommittee will give thorough consideration to this issue. I am going to submit my own closing statement, instead of reading it.

[The closing statement of Senator Grassley follows:]

CLOSING STATEMENT, HEARING ON MILITARY MEDICAL MALPRACTICE, JUNE 24, 1986

I would like to thank the witnesses who testified today. I would like to especially thank my colleagues, Jim Sasser and Dan Glickam. I know they are both deeply concerned about the quality of medical treatment being given to our young men and women serving in the military.

We are all gravely concerned about the allegations of medical malpractice committed by military doctors. We all want to ensure that our military personnel—who often serve our country at great sacrifice to themselves—receive the finest medical treatment possible.

Today, we have tried to concentrate on the legal issues involved in any attempt to change the Federal Tort Claims.

The testimony we have heard today should go a long way toward helping us in the legislative task lies ahead. There are many different issues involved in this legislation and, while the witnesses have shed a great deal of light on many of them, there are still others which need to be examined more closely.

H.L. Mencken once wrote "For every complex problem there is a solution that is simple, neat, and wrong." Likewise we must be certain that before we take any action to solve this complex problem—even if the solution appears to be neat and simple—that it is not the wrong solution. Right or wrong, the *Feres* doctrine has been with us for 36 years and we must be sure of what we are doing before we enact a law of farreaching effects.

It seems that any legislation in this area should serve two purposes. The first is to make sure that military members who are injured as a result of negligent medical treatment receive prompt, fair, and adequate compensation for their disabilities. The second is what should be done to ensure that the quality of the medical services delivered to our Armed Forces personnel is the best possible available, and how to make the military medical system more responsible and responsive.

Whatever legislative route we choose, we should be faithful to these purposes.

Some of our witnesses have suggested tort alternatives consistent with these purposes, which should be further explored.

I look forward to continuing to work with interested parties; to come up with workable solutions.

Once again, I'd like to thank everyone who has participated for the effort and the interest they have shown.

The Catholic University of America

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July 2, 1986

The Honorable Charles E. Grassley
Subcommittee on Administrative
Practice and Procedure
Hart Senate Office Building
Room 229
Washington, D.C. 20510
Attention: Mr. Giordano

Dear Senator Grassley:

This is in response to your letter of June 26th. My answers to your questions follow:

1. "Assuming a change in the current 'incident to service' bar in the Act, would your proposal contemplate that the services would administratively adjudicate malpractice claims?"

Yes, although I must emphasize that my statement did not recommend a change in present procedures. I simply said that if the Committee concluded that there should be a change in the way the Feres Doctrine is applied, that change could be accommodated by modifying 10 USC 2733 and thus ensuring that there would be no judicial "second guessing" of military decisions. I left open the fault question: 10 USC 2733 authorizes payment without proof of fault; the bills under consideration would require fault as a condition precedent to payment. If you wanted to limit payments to fault situations, it would be possible to draft an exception, similar to the Bivens exception to their intentional tort exemption in the Federal Tort Claims Act, 28 USC 2680(h). The following language is intended to achieve that end.

"Add to 10 USC 2733(b)(3) the following: Provided, that, with regard to acts or omissions of military personnel which shall constitute medical malpractice, as defined by the Secretary concerned, the provisions of this section shall apply unless such payment would, in the judgement of the service concerned, be contrary to good order and discipline."

1a. "Would such claims be paid without a hearing on negligence issues?"

Yes. The most comprehensive review of the claims process, Berman's "Administrative Settlement of Tort Claims", 1984 ACUS at 816, reports that there have been virtually no complaints about the absence of a personal hearing, and at 818-819 notes that there are no constitutional objections to the present practice.

1b. "How would the services decide the amount of a claims payment? I assume the calculation under the Act would be more complex than in the 'sonic boom' cases you testified about."

The services are now authorized to adjudicate personal injury and death claims under the provisions of 10 USC 2733(a)(3) and no problems have arisen. I assume that other government benefits would be deducted from any awards. Brooks v. United States, 337 U.S. 49 (1949); Annot., 12 A.L.R. 3d 1245 (1967). See also 62 Op. Comp. Gen. 280 (1983) (adjudication, under 10 USC 2733, of a civilian medical malpractice claim which arose overseas and was thus barred by the Federal Tort Claims Act, 28 USC 2680 (k)).

2. "The $100,000 ceiling for payment under the Act without reference to the Comptroller General (section 2733(d)) seems to be too low to accommodate awards for medical malpractice. Do you suggest that Congress raise this amount again?"

No, I do not. There is no indication that payments in excess of $100,000 are unduly delayed. The Administrative Conference Report indicates that GAO processes tort payments within six to eight weeks. 1984 ACUS 864.

2a. "Do you see such an amendment creating other problems, e.g., the 'fairness' of raising it only for malpractice cases?"

Yes, I do. The only reason that can be persuasively advanced for singling out malpractice victims and their families is that they merit special consideration because they lost a more valuable opportunity (to recover a large award) than do the victims of other service related injuries. However, I do think it is possible for the Congress to define "incident to service" as the term is used in 10 USC 2733(b)(3) to permit some claims which are presently barred by the Feres Doctrine.

3. "As another alternative, is it feasible to establish a kind of 'Medical Care Review Board' within DOD to administratively adjudicate (under the APA) allegations of malpractice? (such a board could feature civilian Presidential appointees with medical and legal training who could hear allegations of substandard care, pursuant to section 554 of the APA. The Board could then make recommendations to the service Secretary that (1) additional compensation be awarded, and/or that (2) disciplinary action be taken against particular doctors)."

While it is feasible to establish an administrative hearing process, it would be contrary to standard agency practice in the handling of tort claims against the government, 1984 ACUS 816, and would serve as a precedent for other legislative efforts to apply the Administrative Procedure Act to military personnel actions. See generally, Folk, The Administrative Procedure Act and the Military Departments, 108 Mil. L.Rev. 135 (1985).

3a. "Are there any civilian agency analogues (e.g. Benefits Review Board of the Department of Labor; Federal Mine Safety and Health Review Commission; Occupational Safety and Health Review Commission) that provide a useful framework for such a Board?"

No, I am not aware of any useful analogues. The hearing which you chaired in 1982, The Feres Doctrine as it Relates to Private Claims, Hearing Before the Subcomm. on Agency Administration, Senate Comm. on the Judiciary, 97th Cong., 2d Sess. contained a comprehensive description of the Veterans Administation and Department of Defense disability compensation programs, which seem to work well and apply to all categories of service connected injuries and death.

Sincerely,

Michael F. Noone, Jr.
Associate Dean

MFN:bca

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10 July 1986

Charles E. Grassley
Chairman, Subcommittee on Administrative
Practice and Procedures
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Grassley:

This letter is in response to your's of July 1, 1986 in which you posed several questions following testimony you heard on the Feres doctrine.

The first question was regarding the special relationship between a soldier and his military commander. I do not agree that permitting the active duty person to sue physicians for malpractice will directly effect relationships between soldiers and officers in the "line". However, I believe there is at least one indirect concern which supports the position of the U.S. Supreme Court and also the military in this matter.

Recall that almost all personnel in military medical positions have physician commanders. It is not uncommon for the physician commander to be the doctor of one of his subordinates. In this situation permitting the subordinate to sue the doctor may result in a potentially adverse doctor patient relationship which does not currently exist.

There is a counterpart to this in the civilian sector. It is unusual for a physician employer to serve as the doctor for an employee. At one time this was because the relationship there was such that the employee was considered part of the family, and physicians are generally reluctant to treat family. However, increasingly I am receiving the message that physician employers are not seeing their employees as a doctor as a function of defensive medicine. Employees have access to records and, of course, understand much more than any other potential patient the personality of the physician and so forth. This could be used against the physician in any litigation or at least in the preparation of litigation.

I do not know how much "defensive medicine" adds to the cost of medical care. I do not believe anyone knows. The figure that we routine use in discussing this problem with medical students and residents is approximately 25% of the total health care bill. Be that as it may, I do not believe that permitting active duty personnel to sue military physicians for malpractice will add to defensive medicine. It is not uncommon for active duty personnel and nonactive duty personnel to be placed in the hospital side by side. It is inconceiveable to me that a practice approach used by a physician will change dramatically as the physician walks from one bed to the next. I certainly have not seen this in my years of active observation of the practice of military medicine.

I do believe if active duty personnel are to be compensated for being victimized by military medical malpractice that this could be done by simply enhancing the compensation benefits these servicemen and women currently receive for disability. Administratively it could be handled in the following fashion. Currently under quality assurance programs in the military, certainly the Army, the medical record is reviewed exhaustively within the first few days of discharge of the patient. Questions generated by that review are flagged and then discussed at a number of levels in the review process. If the result of those discussions indicate the patient's disability was made worse by medical intervention (without calling it at this point malpractice), the patient's level of compensation otherwise received would be increased by a certain factor. There are certainly a number of guidelines to determine what that factor

might be. For example, numerous Workmen Compensation Disability Tables, the Guides to Evaluation of Permanent Impairment of the AMA, and others could be utilized.

The important point is the recognition that the increased disability has occurred as a result of the medical care delivered would come from physicians who in no way either professionally or psychologically will be penalized for voicing that recognition. Let me give you an example. A patient has a ruptured lumbar disc and is operated on by the neurosurgery service. As a result of that operation the nerve root which has been pinched by the ruptured disc is permanently damaged. In review of the record in the quality assurance program one of the questions asked is, is the patient's symptoms worse following treatment than before. The question would be answered yes by the head of neurosurgery in that institution who is reviewing records. The record routinely goes forward to the department of surgery quality assurance review board. The department of surgery quality assurance review board, noting the yes, asks the neurosurgeon for an explanation. The neurosurgeon points out that this complication may occur in up to 5% of these operations, that it doesn't necessarily indicate negligence on the part of the surgeon, but definitely has added to that patients disability. The department of surgery review board recommends that the patient be compensated extra for the medical care induced disability. The hospital commander (or other appropriate individual) signs off on this, the disability review board then takes that, looks at the appropriate tables, and determines a percent increase in the individual's disability. Perhaps it would go from 25% to 50%.

I really don't have a good answer for the question regarding "incident to service" claims. My feeling is that this could be handled administratively similar to the situation I have described above. I have no other comment to make on this point.

I would like to comment on an issue raised in my testimony but not addressed in your questions and that is the question of continuing education for physicians. As I attempted to point out in my testimony the key to excellent medical care in the military for active duty personnel is competent physician support. Physician competency depends upon a tripartate process. The physician initially must be well trained and skillful, thus the importance of the credentialling effort. Clearly this effort in the military is much more thorough and accurate than in the past. The next limb of this process involves constant review of outcome. The quality assurance program, responsible for this review, is tighter than anything I have seen in the civilian sector and therefore, can be considered successfully implemented. The third limb of this process involves continuing education of the physician so that his knowledge remains timely and his skills do not become obsolete. I believe the continuing education program for physicians in the military should be significantly strengthened.

I know it is not a primary area of jurisdiction for your subcommittee but I would hope that you will use your influence to interest the appropriate people in government who can seriously address this issue.

I would like to, in closing, express my sincere gratitude to you for this opportunity to participate in the legislative process.

Sincerely,

cw watts

Clark Watts, M.D.

CW/bjr

cc: Charles Plante

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301

11 JUL 1986

Honorable Charles E. Grassley
Chairman, Subcommittee on
Administrative Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Your letter of July 1, 1986 requested me to respond to questions posed by Senator Specter. His questions and my answers follow.

1. While the proposed bills provide for an exception to the Feres doctrine by allowing servicemen on active duty to sue for medical malpractice, they are unclear as to the rights of family members or non-military personnel, where malpractice occurs at a military facility. Could you please clarify the rights of these persons under S. 489 and H.R. 3174?

Answer. Under current law, only military personnel on active duty may not sue the United States for torts incident to their military service. Thus, retired members and family members of active-duty and retired members may sue for medical malpractice, provided the requirements of the Federal Tort Claims Act, as amended, 28 U.S.C. § 2671 et seq., are met. Neither S. 489 nor H.R. 3174 would affect the rights of persons who are not on active duty.

2. Under the Federal Tort Claims Act, family members or non-military personnel maltreated at a military facility cannot sue the United States when the malpractice occurs at a facility located in a foreign country. In light of the number of foreign bases with medical facilities and the large number of non-military personnel on these bases, it seems unrealistic that these classes of people are not provided for under the proposed legislation. What is your position regarding protection for non-military personnel maltreated in facilities in foreign countries?

Answer. The Federal Tort Claims Act, as amended, does not apply to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The Department of Defense supports the continuation of this provision. The substantive tort law of the state in which a tort occurs determines the liability of the United States. Id. § 2674. Such law is not available overseas. Moreover, in many cases it would be extremely burdensome to litigate cases in

which the incident at issue transpired overseas, and many of the witnesses and the documentary evidence are also abroad.

Patients who are not barred from suing by the Feres doctrine and who suffer malpractice in a DoD medical treatment facility overseas may file a claim under the Military Claims Act, 10 U.S.C. § 2733. A Military Department may award up to $100,000 in settlement of such a claim. If the Secretary of the Military Department concerned believes that the claimant should receive more, the Secretary may report the additional amount to the Comptroller General for payment.

3. What is the impact of S. 489 and H.R. 3174 on the Military Claims Act, which provides for a $25,000.00 ceiling on claims with no judicial review?

Answer. Neither bill would affect the Military Claims Act. As noted in the answer to question 2, the Military Claims Act now permits a Military Department to pay claims up to $100,000, with additional amounts reported to the Comptroller General for payment. Pub. L. No. 98-564, § 1, 98 Stat. 2918.

Thank you for the opportunity to answer Senator Specter's questions.

Sincerely,

H. Lawrence Garrett, III

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

June 30, 1986

Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During the Honorable H. Lawrence Garrett, III's testimony before your Subcommittee on June 24, 1986, you asked for data concerning the number of Department of Defense physicians whose credentials have been withdrawn in recent years. The enclosed report, which was prepared by the Office of the Assistant Secretary of Defense (Health Affairs) based on information supplied by the Military Departments, is a comprehensive review of adverse credentialing actions during fiscal years 1983-85. The material at pages 5-6 and the accompanying charts are especially responsive to your request.

I hope that this report is helpful.

Sincerely,

Robert L. Gilliat
Assistant General Counsel
(Personnel & Health Policy)

Enclosure

63-364 O—86——6

SUMMARY OF CASES INVOLVING DECREDENTIALING
OF DoD PHYSICIANS
Fiscal Years 1983-1985

Prepared by
Office of the Assistant Secretary of Defense (Health Affairs)
(Professional Affairs and Quality Assurance)

I. Introduction

Strengthening the credentialing process for health care providers has been a focus of the Department of Defense's (DoD) quality assurance efforts since the DoD-level quality assurance program was established in 1982. Directives issued have addressed areas such as standardizing the credentialing process to ensure that clinical privileges are appropriate to the education and training of each provider, and providing for appropriate and timely action to curtail a provider's privileges when alleged or actual problems may affect patient care. Requirements which are now an integral part of each Service's credentialing program include:

- o Minimum pre-entry credentials screening and verification of key documents. Specification of the minimum requirements for credentialing programs within each military medical or dental treatment facility and the types of DoD health care providers that require credentialing. (DoD Directive 6025.4, Credentialing of Health Care Providers, February 1985).

- o Immediate suspension and/or investigation in cases of possible improper, unethical or unprofessional conduct or substandard care (DoD Directive 6025.3, DoD Health Care Provider Conduct, August 1984).

- o Notification of appropriate professional civilian authorities regarding health care providers with limited or withdrawn privileges at the time of separation or retirement (Directive 6000.7, Dissemination of Information on Medical Officers, July 1982). As of March 1986, an ASD(HA) memorandum required notification for all permanent actions whether or not the provider separated. Additionally, actions against clinical psychologists are reported directly to the State(s) where the provider holds a current license, in the absence of a national clearinghouse for disciplinary actions.

This report summarizes data on decredentialing actions involving DoD physicians for fiscal years 1983-1985. The frequency and status of all cases that have been reported are provided, and for those cases which were completed as of the last quarterly report for FY 85, distributions are presented by reason for action, type of outcome, and provider specialty.

II. Data

Since FY 83, the Services have submitted quarterly reports to the Assistant Secretary of Defense for Health Affairs on cases in which the credentials, or more precisely, the privileges of DoD credentialed providers were limited, suspended, or revoked. Descriptive information includes the type of provider; specialty, for physicians; employment source; rank or grade; type of and reason for decredentialing actions; and related actions, such as additional training or proctoring. The report also indicates whether notification of appropriate authorities has been made

when employment is terminated with a provider in a less than fully credentialed status.

A case includes the initial report on a decredentialing action and any subsequent quarterly reports with updates on actions taken until the case is completed. A case is considered completed if clinical privileges are fully reinstated, a permanent limitation is imposed on a provider's clinical privileges, all clinical privileges are revoked, and/or the provider is separated from DoD.

Several important changes in the reporting requirements have occurred during the time period represented which explain the emphasis on physicians in this report. The quarterly reporting requirement applied only to physicians until DoD Directive 6025.4, Credentialing of Health Care Providers, was issued in February 1985. As a result, cases involving nonphysician health care providers were first reported in the third quarter of FY 85. Detailed breakouts are not included in this report because of the small numbers of these cases to date.

Initially, the notification requirement was limited to notifying the Federation of State Medical Boards regarding physicians. Since November 1984, the American Association of Dental Examiners has been notified of dental officers separated from DoD with dental privileges that are limited or revoked. In June 1985, a similar requirement was extended to nurses with notification to the National Council of State Boards of Nursing. The most recent modification in March 1986 expanded notification to include actions against clinical psychologists and all completed permanent actions.

In addition to the internal reporting system just described, data from DoD Health Manpower Statistics (FY 83, 84, 85) were used in this report.

III. Analysis

The analysis is descriptive. Trends are noted to the extent possible. However, as will be emphasized throughout the discussion, certain statements are tentative because the percentage of completed cases differs in each of the three years analyzed. In addition, the volume of cases which might be expected is not known. With those caveats, the types of questions examined were:

- o How frequently are decredentialing actions taken?
- o What is the most frequent reason for action taken?
- o What are the final outcomes of the decredentialing actions? For example, are privileges fully reinstated or are permanent limitations imposed on a provider's privileges?
- o Which physician specialties have had decredentialing actions taken? What is the relative frequency of actions taken for the various specialties?

Frequency of Cases

Table 1 summarizes the frequency of all cases reported to DoD involving decredentialing of DoD physicians by fiscal year of the initial report. Both the number and the rate of cases involving physicians doubled from FY 83 to FY 85. In FY 83, there were .7 cases of decredentialing per 100 physicians, .9 in FY 84, and in

FY 85 the rate was 1.4. In other words, in FY 85 approximately 1.4 percent of DoD physicians had decredentialing actions taken against them.*

The increase in actions taken does not necessarily mean more substandard care or more cases of provider impairment over time. Rather, it probably indicates increased use of decredentialing as a tool in review of potential and actual problems or of allegations of problems which affect the quality of patient care delivered. Evidence to support this explanation of the increase in cases of decredentialing will be discussed in the section on outcomes of decredentialing actions. Moreover, the heterogeneity of the cases reported under the rubric of decredentialing actions should be kept in mind. The actions taken range from proctoring in a particular skill area for a limited period of time to revocation of all clinical privileges. In some cases, the action is at the physician's own request rather than initiated by patient complaint or peer review activity.

Although not presented in the table for reasons already stated, an additional 34 cases involving the decredentialing of nonphysician health care providers were reported during the last two quarters of FY 85. Included were 10 dentists, 8 nurse anesthetists, 3 physician assistants, 4 clinical social workers, 2 clinical psychologists, 2 clinical pharmacists, 3 optometrists, 1 podiatrist, and 1 alcohol and drug counselor.

Status of Cases

Table 1 also displays the number and percent of completed cases by fiscal year. The time from an initial decredentialing action to its completion depends on the due process procedures in each case. As a result, the percentage of completed cases is smallest for the most recent fiscal year as would be expected. Therefore, caution is necessary in attempting to compare details of 76 percent of the completed cases in FY 84 with 35 percent completed cases in FY 85. The distributions within categories may shift when data are available for all of the cases.

Reasons for Action

The reasons for the decredentialing actions are categorized in Table 2 as incompetent skills, misconduct, impairment, and other. It should be noted that within each category, some of the cases involve allegations which were determined to be unsubstantiated. As such the number of actual cases of each type is somewhat less than presented.

The largest number and percentage of the completed cases for each of the three years were skill related. Impairment related cases seem relatively constant at about one quarter of the cases. In contrast, behavior related actions were more frequent in FY 84 than in the previous year. Most of the cases in the "other" category listed multiple reasons which cut across the other categories, e.g., incompetent skills and impairment.

Outcomes of Actions and Notifications

Table 3 displays the outcomes of the completed cases by fiscal year. These data suggest a definite shift over the time period. In FY 83, over 40 percent of the cases involved

*The number of cases for the most part represents the number of physicians. During the time period studied, only five physicians had more than one case of decredentialing.

revocation of all clinical privileges, while full reinstatement of privileges occurred in about 20 percent of the cases. The percentages for these two categories reversed the following year with the largest percentage of cases having full reinstatement of privileges. The trend of an increasing percentage of cases with reinstatement appears to continue for FY 85. The shift in type of outcome supports an earlier statement that the increasing number of decredentialing actions indicates increased use of decredentialing as a tool in review of potential and actual problems or of allegations of problems which affect the quality of patient care delivered. The shift may also suggest earlier identification of problems and an increase in remedial actions such as retraining, proctoring, or rehabilitation of impaired providers.

[redacted] In FY 83, 37 DoD physicians were

Table 1

Number and Status of Cases Reported to DoD[a/]
Involving Decredentialing of DoD Physicians
by Fiscal Year of Initial Report

Fiscal Year	All Cases		Completed Cases[b/]	
	No.	Rate[c/]	No.	Percent
83	90	.7	83	92
84	125	.9	95	76
85	189	1.4	66	35

a/ As reported through the end of FY 85.

b/ A case includes an initial report on a decredentialing action and any updates on actions taken until completed. A case is considered completed if clinical privileges are fully reinstated; a permanent limitation is imposed on a provider's clinical privileges; all clinical privileges are revoked; or the provider is separated from DoD.

c/ Per 100 physicians in patient care billets. The number of physicians in the denominator was derived from DoD Health Manpower Statistics (FY 83, 84, 85) as follows: End Strengths Physicians (format 01) minus Physicians in Administrative and Non-Administrative/ Nonpatient Care Billets (format 10) plus Civilian Physicians-FTE (format 06) plus Civilian Physicians-Foreign Nationals FTE (format 07).

Table 2

Reasons for Action in Completed Cases Reported to DoD[a/]
Involving Decredentialing of DoD Physicians
by Fiscal Year of Initial Report

Fiscal Year	Number of Completed Cases[b/]	Reason for Action							
		Incompetent Skills		Misconduct[c/]		Impairment[d/]		Other	
		No.	Percent	No.	Percent	No.	Percent	No.	Percent
83	83	52	63	4	5	21	25	6	7
84	95	46	48	14	15	23	24	12	13
85	66	44	67	4	6	14	21	4	6

a/ As reported through the end of FY 85. These completed cases are 92% of the total cases for FY 83; 76% for FY 84; and 35% for FY 85.

b/ A case includes an initial report on a decredentialing action and any updates on actions taken until completed. A case is considered completed if clinical privileges are fully reinstated; a permanent limitation is imposed on a provider's clinical privileges; all clinical privileges are revoked; or the provider is separated from DoD.

c/ Includes personal misconduct, fradulent, or unprofessional behavior.

d/ Includes alcohol abuse, drug abuse, psychiatric problems, or medical disability.

Table 3

Outcomes of Completed Cases Reported to DoD[a/]
Involving Decredentialing of DoD Physicians
by Fiscal Year of Initial Report

Fiscal Year	Number of Completed Cases[/b]	Outcome							
		Reinstatement		Permnt Limitation		Revocation		Other[c/]	
		No.	Percent	No.	Percent	No.	Percent	No.	Percent
83	83	18	22	27	33	34	41	4	5
84	95	43	45	20	22	24	25	8	8
85	66	35	53	8	12	17	26	6	9

a/ As reported through the end of FY 85. These completed cases are 92% of the total cases for FY 83; 76% for FY 84; and 35% for FY 85.

b/ A case includes an initial report on a decredentialing action and any updates on actions taken until completed. A case is considered completed if clinical privileges are fully reinstated; a permanent limitation is imposed on a provider's clinical privileges; all clinical privileges are revoked; or the provider is separated from DoD.

c/ Includes cases in which the provider separated from DoD while a temporary decredentialing action was in effect, or temporary restriction was placed on reservist on active duty status.

reported, 145 in FY 84, and 149 in FY 85. Not all of the notifications, however, were related to decredentialing actions. In a number of instances, the Services responded to the intent of DoD Directive 6000.7, Dissemination of Information on Medical Officers, by providing information on physicians with problems who were separated from DoD although technically not in a decredentialed status. As an example, the Federation was notified of several residents whose training was terminated because of incompetence even though residents are not credentialed.

Medical Specialties

Specialty rates of decredentialing cases and their relative rankings are shown in Table 4. Because of the small numbers in the various categories, the rank orderings may change when all of cases are completed. Individual specialty rates may also increase. However, several observations can be made.

- o A range of specialties is represented.
- o The rates range from zero to 3 cases of decredentialing per 100 physicians in a specialty or 3 percent of the physicians.
- o Some specialties appear to have rather stable rates, such as general medicine, internal medicine, and preventive medicine. Others exhibit great fluctuations from year to year, possibly due to small numbers of providers in the specialty. Urology is an example. The rates in others appear to be increasing or decreasing. The former may reflect an increasing program focus in a particular area, such as emergency medicine.

IV. Summary

As indicated previously, the analysis of data on cases involving decredentialing of DoD physicians is descriptive. The data are preliminary, until all the cases for a year are completed. The data which are presented suggest the credentialing program is evolving. The rate of cases of decredentialing increased from .7 to 1.4 cases per 100 physicians in patient care. However, the outcomes of these cases shifted from the majority involving revocation of all clinical privileges to the majority involving full reinstatement of privileges. The range of physician specialities represented in these actions suggests a widely applied program.

Table 4

Medical Specialty-
Number, Rate and Rank Order Based on Rate of Completed Cases[a/]
Involving Decredentialing of DoD Physicians
by Fiscal Year of Initial Report

	FY 83			FY 84			FY 85		
	No.	Rate[b/]	Rank	No.	Rate	Rank	No.	Rate	Rank
General Medicine	18	1.3	4	21	1.5	6	18	1.2	3
Anesthesiology	7	3.0	1	6	2.5	1	1	0.3	9
Emergency Medicine	0	0.0	-[c/]	1	0.9	8	3	2.4	1
Family Practice	8	1.1	5	12	1.7	5	5	0.6	6
Internal Medicine	4	0.3	8	6	0.5	10	7	0.5	7
Obstetrics/Gynecology	3	0.6	7	10	1.9	4	4	0.8	5
Ophthalmology	2	1.1	5	3	1.7	5	1	0.6	6
Otorhinolaryngology	4	3.0	1	2	1.5	6	0	0.0	-[c/]
Orthopedics	3	1.1	5	1	0.4	11	4	1.2	3
Pathology	2	0.6	7	0	0.0	-[c/]	1	0.3	9
Pediatrics	6	0.8	6	5	0.7	9	0	0.0	-[c/]
Preventive Medicine	4	0.3	8	4	0.4	11	4	0.4	8
Psychiatry	6	1.5	3	3	0.7	9	5	1.3	2
Radiology	6	1.5	3	5	1.2	7	4	1.0	4
Surgery	10	1.6	2	13	2.0	3	9	1.3	2
Urology	0	0.0	-[c/]	3	2.1	2	0	0.0	-[c/]
Total[d/]	83			95			66		

[a/] A case includes an initial report on a decredentialing action and any updates on actions taken until completed. A case is considered completed if clinical privileges are fully reinstated; a permanent limitation is imposed on a provider's clinical privileges; all clinical privileges are revoked; or the provider is separated from DoD.

[b/] Per 100 physicians in each specialty. Total number of physicians in each specialty was derived from DoD Health Manpower Statistics FY 83, 84 and 85. (format 11).

[c/] No cases reported or cases pending, as reported through end of FY 85.

[d/] These completed cases are 92% of the total cases for FY 83; 76% for FY 84; and 35% for FY 85.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

23 JUL 1986

Honorable Charles E. Grassley
Chairman
Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
229 Hart Senate Office Building
Washington, D.C. 20510

Subject: Questions Submitted By Senator Arlen Specter

Dear Mr. Chairman:

This is in response to your letter of July 1, 1986 to Deputy Assistant Attorney General Robert Willmore in which you transmit questions by Senator Arlen Specter regarding military medical malpractice.

Question 1: While the proposed bills provide for an exception to the Feres doctrine by allowing servicemen on active duty to sue for medical malpractice, they are unclear as to the rights of family members or non-military personnel, where malpractice occurs at a military facility. Could you please clarify the rights of these people under S. 489 and H.R. 3174?

Answer 1: Under current law, the Feres doctrine has no application where family members of non-military personnel are allegedly injured by medical malpractice at a military facility. Dependant family members and non-military personnel can sue the United States on such claims in accordance with the provisions of the Federal Tort Claims Act. Neither S. 489 nor H.R. 3174 would alter this rule.

Question 2: Under the Federal Tort Claims Act, family members of non-military personnel maltreated at a military facility cannot sue the United States when the malpractice occurs at a facility located in a foreign country. In light of the number of foreign bases with medical facilities and the large number of non-military personnel on these bases, it seems unrealistic that these classes of people are not provided for under the proposed legislation. What is your position regarding protection for non-military personnel maltreated in facilities in foreign countries?

Answer 2: Family members of non-military personnel who are injured in foreign countries are barred from suit by Section 2680(k) of the Federal Tort Claims Act. This section precludes suit on "Any claim arising in a foreign country." The policies underlying this exception include issues of national sovereignty, applicable law, and the logistical impracticality of conducting a trial in one nation where witnesses and evidence are in another.

Question 3: What is the impact of S. 489 and H.R. 3174 on the Military Claims Act, which provides for a $25,000.00 ceiling on claims with no judicial review?

Answer 3: By their terms, neither S. 489 nor H.R. 3174 would have any direct effect on the Military Claims Act. The Military Claims Act permits payments under circumstances where the Federal Tort Claims Act does not apply.

I hope these answers adequately respond to Senator Specter questions.

Sincerely,

John R. Bolton
Assistant Attorney General

cc: Senator Arlen Spector

Senator GRASSLEY. With that, I will adjourn the meeting and thank you all very much for attending.

[Whereupon, at 12:52 p.m., the subcommittee adjourned, subject to call of the Chair.]

APPENDIX

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June 6, 1986

Mr. Sam Gerdano
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Senate Judiciary Committee
229 Hart Building
Washington, DC 20510

Dear Mr. Gerdano:

It is my opinion that the Feres Doctrine is an anachronism. If it ever had a rational justification, it is no longer applicable. It places the service person as a second-class citizen within our legal system. The service person who is treated negligently for a medical problem by service personnel is not guaranteed a physician of his/her own choice, the medical facility, which may be arbitrarily selected for him, may not be ideal for his condition, and the availability of veteran benefits is inconsistent and inconstant. Furthermore, the availability of the Federal Tort Claim Act to the service person will have essentially no effect on the malpractice situation.

I hope this comment will be helpful.

Yours truly,

Harold L. Hirsh, M.D., J.D., FCLM

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June 24, 1986

Samuel J. Gerdano
Counsel
Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Gerdano:

Thank you very much for affording me the opportunity to comment on S.489, a bill to permit active duty military personnel to maintain medical malpractice actions against the United States.

I write in support of the bill.

In Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), the Supreme Court distilled the half-dozen reasons for the Feres exception to the Federal Tort Claims Act to three:

(1) The availability of limited compensation under the Veterans' Benefits Act;

(2) The distinctly federal relationship between military personnel and the government, and the presumed impropriety of applying state law to that relationship; and

(3) The potentially adverse effect on military discipline which might arise if military personnel were permitted to sue the government.

More recently, in United States v. Shearer, 105 S. Ct. 3039 (1985), the Court indicated that only the third reason, concern over an adverse effect on military discipline, comprised the basis for the Feres exception.

In my opinion, none of the three reasons serves as a persuasive reason for precluding military personnel from maintaining medical malpractice actions against the government.

The Supreme Court, itself, recognized in United States v. Brown, 348 U.S. 110 (1954), that the availability of veterans' benefits did not automatically preclude an FTCA action against the government. Rather, the amount of veterans' benefits received and receivable could be deducted from any judgment obtained by the plaintiff, thus avoiding "duplicative" recovery from the government.

The presumed impropriety of applying state law to the distinctly federal relationship between military personnel and government becomes a reality only when the allegedly tortious conduct of the military actor is uniquely military in nature. Where, on the other hand, such conduct has an apparent civilian analog there is, in fact, no impropriety in applying state law to that conduct. Obviously, conduct allegedly comprising medical malpractice has a civilian counterpart; state law is applied regularly to such conduct. Consequently, there would appear to be no impropriety in applying state law to a medical malpractice action brought by one in military service.

Nothing seems more calculated to have an adverse effect on military discipline than the present state of the law which says to military personnel, no matter how negligently administered your medical care may be, you are not entitled to a day in court and the opportunity of recovering appropriate damages. Permitting military personnel to maintain malpractice actions against the government would assure such personnel of the opportunity of judicial review of the level of medical care provided and, where appropriate, the recovery of damages for negligent medical care. Such judicial review and the possibility of recovering appropriate damages would seem calculated to have a beneficial effect on military discipline by assuring military patients that the care they received could be reviewed judicially and by apprising military medical care providers of the possibility of such review of the care provided.

For these reasons, I support S 489.

Respectfully and sincerely,

David E. Seidelson

David E. Seidelson
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of Law

DES:wh

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WALTER W. PEGALIS
OF COUNSEL

June 25, 1986

Samuel J. Gerdano
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Gerdano:

I applaud and support any legislation that would permit a member of the Armed Services to obtain full compensation under the Federal Tort Claim Act. I certainly agree that no claim should arise during the time of war nor should any claim arise outside of a "fixed" medical facility.

There are two very important co-existing reasons for allowing such claims to exist. The first and obvious reason is that the innocent victim of malpractice should be entitled to full and complete compensation whether in or out of military service. It clearly is illogical to discriminate against the members of our Armed Forces in this regard.

A second and very important reason is that the existence of these claims undoubtedly improves the quality of medical care. Even if the individual doctor and/or nurse is not personally and directly liable, there still exists the "accountability" mechanism that tends to improve medical care.

Along these lines, I would support a common sense evaluation type system that would look into specific claims separate and apart from the outcome of a claim. This evaluation could then go into the file or record of a negligent doctor and/or nurse for appropriate consideration.

Malpractice claims pursued by competent plaintiff's attorneys tend to bring out facts and circumstances which otherwise would have remained buried and never scrutinized by anyone. That does not automatically mean that a doctor or nurse found negligent is a bad doctor or nurse or needs discipline. Some medical acts and omissions are truly outrageous and require investigation. Others do not. A doctor may generally practice good medicine; be negligent in a particular instance; cause compensable harm to the patient; but yet otherwise be a capable physician. In this latter case, the plaintiff would win and the doctor should not be disciplined. It is possible for a doctor to be outrageously negligent and yet the plaintiff may ultimately not win because the Court may find that no actual harm occurred. In this latter case, the doctor should be investigated and perhaps disciplined.

I, therefore, urge that any system of reviewing and evaluating doctors be on a case-by-case common sense basis that would be considered independent of the particular outcome of the malpractice suit.

Thank you for inviting my comments. If there are any points that I have raised herein that are not clear, please do not hesitate to contact me for clarification or any other help that I may furnish.

Sincerely,

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ART OF ADVOCACY - CROSS-EXAMINATION OF MEDICAL EXPERTS ON VIDEO -
MATTHEW BENDER & CO., 1984

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TOPIC: MEDICAL QUACKERY & MALPRACTICE,
May 31, 1984

TESTIFIED BEFORE NEW YORK STATE LEGISLATURE

NEW YORK STATE ASSEMBLY,
REPUBLICAN TASK FORCE ON HEALTH FRAUD
TOPIC: HEALTH AND CANCER FRAUD,
December 3, 1985

TESTIFIED BEFORE NEW YORK CITY COUNCIL PRESIDENT ANDREW STEIN'S COMMITTEE INVESTIGATION ON MEDICAL MALPRACTICE

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Books

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AMERICAN LAW OF MEDICAL MALPRACTICE, Volume 2, Pegalis, S.E., Wachsman, H.F., Lawyers Cooperative Publishing Co., Published in 1981.

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American Academy of Forensic Sciences, 32nd Annual Meeting, February 20, 1980, New Orleans, Louisiana: PREVENTING MEDICAL MALPRACTICE CLAIMS, NEUROSURGICAL AND NEUROLOGICAL MALPRACTICE.

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Nassau-Suffolk Trial Lawyers Association, November 17, 1981: CROSS-EXAMINATION OF THE DEFENDANTS MEDICAL WITNESS.

American Trial Lawyers Association, First Circuit Seminar, Cambridge, Mass., November 19-21, 1981: NEUROLOGICAL, NEUROSURGERY, GYNECOLOGY, EMERGENCY ROOM, INTERNAL MEDICINE AND MALPRACTICE SEMINAR.

The Association of Trial Lawyers of America, New Jersey Affiliate, Boardwalk Seminar, Atlantic City, New Jersey, April 16-17, 1982: NEURO-ANATOMY AND MEDICAL ACCIDENTS.

New York State Bar Association, 105th Annual Meeting, New York, New York, April 29, 1982: PSYCHIATRIC MALPRACTICE.

American College of Legal Medicine, 22nd International Conference on Legal Medicine, Boca Raton, Florida, May 21, 1982: HARASSMENT OF EXPERT MEDICAL WITNESSES.

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American Trial Lawyers, Annual Meeting, Toronto, Canada, July 20, 1982: THE CLIENT WHO REFUSES TREATMENT. THE DOCTRINE OF AVOIDABLE CONSEQUENCES.

International College of Surgeons, Atlantic City, New Jersey, September 14, 1982: THE LEGAL EXPOSURE FOR THE PHYSICIAN WHO RENDERED EMERGENCY ROOM CARE; and panel discussions.

Association of Hospital Administrators of Long Island, Huntington Hospital, Huntington, Long Island, October 12, 1982: COMMON ERRORS IN THE HOSPITAL WHICH RESULT IN MALPRACTICE SUITS; and panel discussions.

Supervising Nurses of Southside Hospital, Bayshore, New York, January 26, 1983: NURSING MALPRACTICE; and panel discussions.

New York Law School, New York, New York, February 1, 1983: LAW AND MEDICINE.

Molloy College-School of Nursing, Rockville Centre, New York. February 2, 1983: MEDICAL MALPRACTICE AS IT RELATES TO THE NURSING PROFESSION; and panel discussions.

Suffolk Academy of Law, Stony Brook University, New York. March 12, 1983: BASIC ANATOMY FOR ATTORNEYS.

Practicing Law Institute, New Orleans, LA. March 18-19, 1983: ADVANCED MEDICAL MALPRACTICE SEMINAR.

Practicing Law Institute, New York, New York, April 22-23, 1983: ADVANCED MEDICAL MALPRACTICE SEMINAR.

The Association of Trial Lawyers of America, Washington, D.C. July 19, 1983: EVALUATION OF MEDICAL NEGLIGENCE CASES.

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New York State Trial Lawyers Association, New York, New York. November 14, 1983: MANAGEMENT OF THE NEONATE.

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New York State Trial Lawyers Association, Conference, New York, New York, November 3, 1984: NEUROSURGERY AND NERVE INJURIES.

International Psychiatric Research Society, White Plains, New York, November 11, 1984: CEREBRAL PALSY-MALPRACTICE AND ITS PSYCHIATRIC CONSEQUENCES.

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National Law Journal-New York Law Journal Seminar, New York, New York. November 16, 1984: THE MANAGEMENT OF THE NEONATE.

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The American College of Legal Medicine, Chairman, New Orleans, Louisiana. May 8, 1985 to May 11, 1985: 25TH INTERNATIONAL CONFERENCE ON LEGAL MEDICINE.

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